CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1929

THOMAS M. HURT v. SAVONA MANUFACTURING COMPANY, A CORPORATION, LUM BRUTON AND WILL FOX.

(Filed 27 November, 1929.)

1. **Removal of Causes C b—Allegations of complaint are controlling as to whether cause is joint or separable.**

   Upon a petition for removal of a cause from the State to the Federal Court on the ground of separable controversy the allegations of the complaint are controlling upon the question as to whether the cause is joint or separable, and where the facts alleged in the complaint set forth the duty and breach of duty by each of the defendants, and that such breach proximately caused the injury in suit, the complaint alleges a joint tort and the petition will be denied.

2. **Same—Petition for removal must allege facts compelling the conclusion that joinder was fraudulent as matter of law.**

   A petition for removal of a cause from the State to the Federal Court on the ground of fraudulent joinder must allege facts which lead unerringly to, or rightly engender and compel the conclusion that the joinder is fraudulent as a matter of law, and a mere traverse of the facts alleged in the complaint is insufficient, and such fraudulent joinder cannot be established where by the settled law of the State in which the action is brought, and in which it arose, both defendants are jointly liable.

APPEAL by plaintiff from *Shaw, J.*, at October Term, 1929, of MECKLENBURG, from order of removal to United States Court. Reversed.

The complaint sets forth, in substance, the following allegations of fact: That plaintiff was a loom-fixer in weave-room of Savona Manufacturing Company. That Will Fox was overseer and Lum Bruton was second hand of said weave-room; that plaintiff, in his employment, was subject to the orders and directions of the said Will Fox and Lum Bruton; that Will Fox, overseer, and Lum Bruton, second hand, had charge of said weave-room and of the machinery therein, and were responsible for keeping and operating the same in a safe and proper condition; that in said weave-room the pulley on the overhead shaft was not in line with the loom pulley; that the connecting belt would not run on the face of the two pulleys, but would slip over and frequently slip off the overhead pulley and become wrapped around the shaft; that several times before 2 April, 1929, said belt had slipped off while the machinery was in operation, and plaintiff called the attention of Will Fox, overseer, and Lum Bruton, second hand, to this condition; that each of them saw the said condition, acknowledged the danger thereof and promised to have the pulleys put in line, and eliminate the danger; that on the Saturday before plaintiff was injured the dangerous condition of the machinery was called to the attention of Will Fox, overseer, at which time the plaintiff suggested that he be allowed to make the necessary changes, and thereupon said Will Fox, overseer, told the plaintiff to do his own work, which did not involve any work on the overhead shafting and machinery, and that he, the said Will Fox, overseer, would see that the position of the overhead pulley was changed so that it would be in line with the loom pulley; that was on Saturday afternoon, and that the said change was not made and the same condition was allowed to exist up to the time (Tuesday) the plaintiff was injured; that the connecting belt was thrown off the pulley with such force as to knock off the belt guide, which struck and injured the plaintiff, who was standing nearby, the machinery at the time being in operation and making 350 revolutions per minute or thereabout; that at the time plaintiff was injured he was engaged, or about to engage, in fixing a loom, and was under the directions of Will Fox, overseer, and Lum Bruton, second hand.

There is no dispute about the fact that the defendant filed its petition and bond in due time, and that all formalities of law were complied with. The petition of defendant for removal to the United States Court alleges, in substance: That the plaintiff, for five years prior to his injury, had been a loom-fixer in the employment of the defendant, petitioner. At the time of his injury the plaintiff was attempting to correct a belt which ran from a pulley to a loom. Instead of stopping the machinery, the plaintiff took a quill about 7 inches long and began working with the moving belt. He was doing this in his own way, free from the

supervision or instruction of any one, and while thus engaged, received the injury. The work in which the plaintiff was engaged at the time of his injury was that of plaintiff alone, and it was no part of Bruton's or Fox's duties, and no part of their duties to furnish plaintiff a reasonably safe place to work. Neither of the individual defendants were present at the time of the plaintiff's injury and neither of them were in any way, either directly or indirectly, connected with said injury.

The court below rendered the following judgment: "Upon hearing the petition and the appeal from the clerk, and, upon the argument of this motion, the court is of the opinion that this is a proper case for removal, and the petition of the defendant, Savona Manufacturing Company, and the bond filed therewith, are hereby accepted, and this case is ordered removed to the United States District Court for the Western District of North Carolina, at Charlotte, and the order of the clerk is reversed. It is further ordered that this court proceed no further in this action." Plaintiff assigned error and appealed to the Supreme Court.

Stewart, MacRae & Bobbitt for plaintiff.
John M. Robinson for defendant.

CLARKSON, J. The question involved: Is the nonresident defendant, Savona Manufacturing Company, legally entitled under its removal petition to have this action transferred to the United States District Court for the Western District of North Carolina for trial by reason of the allegations of its petition that Lum Bruton and Will Fox, resident defendants, were joined as defendants fraudulently and for the purpose of depriving petitioner of its alleged right of removal? We think not.

This action is for actionable negligence. All the defendants are charged with a duty they owed to plaintiff and for the nonperformance of that duty, which was the proximate cause of plaintiff's injury, they are sued as joint *tort-feasors*. The facts alleged in the complaint of plaintiff sets forth the duty and breach in detail. Under the facts in this action, as alleged in the complaint, the allegations are controlling, upon the question as to whether the cause of action is joint or separable.

In *Crisp v. Fibre Co.*, 193 N. C., at p. 85, it is said: "The facts alleged in the petition for removal neither compel nor point unerringly to the conclusion that the joinder in the instant case is a fraudulent one and made without right. We hold, therefore: (1) That when a motion to remove a suit or action from the State court to the District Court of the United States for trial is made on the ground of an alleged separable controversy, the question of separability is to be determined by the manner in which the plaintiff has elected to state his cause of action,

whether separately or jointly, and, for this purpose, the allegations of the complaint are controlling. *Morganton v. Hutton,* 187 N. C., 736. (2) That when the motion to remove is made on the ground of an alleged fraudulent joinder, the petitioner is entitled to have the State Court decide the question on the face of the record, taking, for this purpose, the allegations of the petition to be true. To warrant a removal in such case, however, the facts alleged in the petition must lead unerringly to the conclusion, or rightly engender and compel the conclusion, as a matter of law, aside from the deductions of the pleader, that the joinder is a fraudulent one in law and made without right. *Fore v. Tanning Co.,* 175 N. C., 584." *Swain v. Cooperage Co.,* 189 N. C., 528; *Fenner v. Cedar Works,* 191 N. C., 208; *Givens v. Savona Mfg. Co.,* 196 N. C., 377; *Chicago, etc., R. Co. v. McWhirt,* 243 U. S., 426, 61 L. Ed., 830, 37 Sup. Ct., 392; *Johnston v. Utility Co.,* 197 N. C., 393; *Slaughter v. Lumber Co.,* 197 N. C., 395.

Fraudulent joinder of a resident with a nonresident defendant, for the purpose of defeating the removal of the cause to a Federal Court, cannot be established, where, by the settled law of the State in which the action was brought, and in which the cause of action arose, both defendants were jointly liable to suit. *Chicago B. & Q. R. Co. v. Willard,* 220 U. S., 413, 31 Sup. Ct. Rep., 460.

In the present action the defendant traversed the facts in the complaint. The case of *R. R. v. Lloyd,* 166 N. C., 24, was affirmed by the Supreme Court of the United States. See 239 U. S., 496, 60 Law Ed., 402. In that case, speaking to the subject, the Court said: "In no case can the right of removal be established by a petition to remove which amounts simply to a traverse of the facts alleged in the plaintiff's petition, and in that way undertaking to try the merits of the cause of action, good upon its face. *Chesapeake & O. R. Co. v. Cockrell,* 232 U. S., 146, 58 L. Ed., 544, 34 Sup. Ct. Rep., 278. It is only in cases wherein the facts alleged in the petition for removal are sufficient to fairly raise the issue of fraud that the State court is required to surrender its jurisdiction."

Viewed in the light of the above principles set forth in the authorities cited, the record in the instant case fails to disclose a right of removal.

Reversed.

W. J. SHUFORD, RECEIVER OF THE Y. & B. CORPORATION, v. J. YARBROUGH ET AL.

(Filed 27 November, 1929.)

1. Pleadings D b—Action will be dismissed for misjoinder of parties and causes, but will be divided where there is misjoinder of causes.

Upon demurrer, when it appears from the complaint that there is a misjoinder of both parties and causes of action, the action will be dismissed, C. S., 511, but where it only appears that there is a misjoinder of causes, the case will be retained and the several causes divided into as many actions as may be necessary for the proper disposition of the case. C. S., 516.

2. Pleadings D e—Upon overruling of demurrer and appeal taken therefrom it is error for court to set time for filing answer.

Where a demurrer to an action upon the ground of misjoinder of parties and causes of action has been overruled in the Superior Court and the judgment of the Superior Court is affirmed in the Supreme Court, the demurring party has the statutory right to file an answer at any time within ten days after the Superior Court has received the certificate of the opinion of the Supreme Court, of which statutory right the Superior Court cannot deprive him, C. S., 515, and it is error for the trial court in overruling the demurrer to require the defendant to file an answer at a fixed time, there being no finding that the demurrer was frivolous. C. S., 599.

APPEAL by defendants from *Stack, J.*, at April Term, 1929, of MECKLENBURG.

The plaintiff brought suit against the defendants as directors of the Y. & B. Corporation to recover a large sum of money for the benefit of the creditors and the stockholders of the corporation on account of the alleged misapplication of its assets. The defendants demurred to the complaint on the ground that it shows a misjoinder of parties and causes of action. The demurrer was overruled; judgment by default was given for want of an answer; and the cause was then referred to a referee who was to hear the evidence, ascertain the liability, if any, of the defendants, and to make his report to the court. The judgment contains this provision: "If the defendants shall file their answer to the complaint in the office of the Superior Court of Mecklenburg County on or before 10 o'clock a.m., 13 April, 1929, then and in that event the part of this judgment which is by default for want of an answer shall stand stricken out and the referee will hear the case on all the pleadings on file and report his findings and conclusions as required above." The defendants excepted and appealed.

Preston & Ross and E. B. Cline for receiver.

Tillett, Tillett & Kennedy for unsecured creditors.

Fred B. Helms, F. W. Orr, Jake F. Newell, Wade H. Williams, John Newitt, Fred Hunter and Pharr & Currie for appellants.

ADAMS, J. A defendant may demur to the complaint when it appears upon the face thereof that . . . there is a defect of parties plaintiff or defendant, or that several causes of action have been improperly united. C. S., 511. If it appears from the complaint that there is a misjoinder both of parties and of causes of action and a demurrer is interposed, not only will the demurrer be sustained, but the action will be dismissed. *Bank v. Angelo,* 193 N. C., 576. But if the demurrer is sustained for the reason that several causes of action have been improperly united, the several causes may be divided into as many actions as may be necessary for their proper determination. C. S., 516; *Gattis v. Kilgo,* 125 N. C., 133.

The defendants demurred to the complaint for an alleged defect of parties plaintiff and defendant, for an alleged misjoinder of causes of action, and for the alleged insufficiency of the complaint to state a cause of action. We need not discuss each of these phases in its relation to the allegations in the complaint; the demurrer admits the allegation that in order to pay the creditors it is necessary to sue the directors. There is no misjoinder of parties, and there being no fatal misjoinder of causes of action the demurrer was properly overruled. *Trust Co. v. Peirce,* 195 N. C., 717. Even if two causes of action are to some extent inconsistent, the complaint is not always on that account demurrable. *Worth v. Trust Co.*, 152 N. C., 242.

The judgment, however, is not free from error. If a judgment overruling a demurrer is affirmed on appeal to the Supreme Court the demurring party may file an answer at any time within ten days after the lower court receives the certificate of the Supreme Court. C. S., 515. This is a statutory right of which the trial court cannot deprive him. There is no finding that the demurrer was frivolous. C. S., 599. The judgment is affirmed to the extent of overruling the demurrer; the remainder of it is stricken out, and as thus modified the judgment is affirmed.

Modified and affirmed.

F. M. YOUNGBLOOD, CHAS. P. MOODY, G. D. MOODY, H. B. ASBURY, AND W. F. MOODY, PARTNERS, TRADING AS F. M. YOUNGBLOOD & COMPANY, v. HUGH E. TAYLOR.

(Filed 27 November, 1929.)

1. Accord and Satisfaction A a—Where there are two accounts a check for account in full for amount of one is not satisfaction of the other.

Where the defendant maintains two accounts with the plaintiff, one for dry goods and one for groceries, his check cashed, purporting upon its face for account in full, drawn for an amount corresponding with one

account then due, cannot be successfully set up as an accord and satisfaction for them both, the other account not being due when the check so stated and given and received.

2. Interest A a—Where judgment is recovered on an account the interest runs from the time amount was due.

Where a judgment has been correctly rendered as to the amount of an account due by the defendant to the plaintiff, but the interest according to the judgment appears to have been awarded from the wrong date, upon consent of the parties as to the correct amount of the interest, the judgment will be accordingly modified and affirmed on appeal.

APPEAL by defendant from *Stack, J.*, at September Term, 1929, of ROWAN.

Civil action to recover $183.10, with interest from 30 December, 1927, alleged balance due on "dry goods" store account.

From a verdict and judgment in favor of plaintiffs for $183.10, with interest from 21 June, 1927, the defendant appeals, assigning errors.

Armfield, Sherrin & Barnhardt for plaintiffs.
George R. Uzzell for defendant.

STACY, C. J. It is in evidence that on 1 August, 1927, defendant gave plaintiffs a check for $379.81, with notation, "For Acct. in full," appearing thereon, which was cashed by plaintiffs. Defendant pleads this check in bar of plaintiff's claim, under the principle of accord and satisfaction as announced in *Hardware Co. v. Farmers Federation,* 195 N. C., 702, 143 S. E., 471, and cases there cited.

It appears, however, that the check of 1 August, 1927, was for the exact amount of defendant's "grocery account," and that his "dry goods account" of $183.10 was not then due. Plaintiffs' right to recover for the undisputed "dry goods account" is supported by the decisions in *Oil Co. v. Moore,* 195 N. C., 305, 141 S. E., 926, *Refining Corp. v. Sanders,* 190 N. C., 203, 129 S. E., 607, and *Bogert v. Manufacturing Co.,* 172 N. C., 248, 90 S. E., 208.

But as the dry goods account was not due until 30 December, 1927, it was error to allow interest from 21 June, 1927. This was an inadvertence, and plaintiffs consent to a modification of the judgment. As thus modified, the verdict and judgment will be upheld.

Modified and Affirmed.

WM. A. BURKE, ADMINISTRATOR OF THE ESTATE OF WM. A. BURKE, JR., v. CAROLINA COACH COMPANY AND DR. L. B. CAPEHEART.

(Filed 27 November, 1929.)

1. **Highways B e—Parking on highway in violation of C. S., 2621(66) must be proximate cause to be actionable.**

   Negligence in parking an automobile on a public highway in violation of C. S., 2621(66)), to be actionable must be a proximate cause of the injury in suit, and where the plaintiff fails to show by his evidence that such violation was a proximate cause of his injury, a judgment as of nonsuit is properly allowed.

2. **Highways B c—Speed on highway must be proximate cause of injury to be actionable.**

   Where in an action to recover damages for the killing of plaintiff's intestate alleged to have been negligently caused by the driver of defendant's bus in exceeding the statutory speed limit, C. S., 2618, it is required that the negligence complained of must have been a proximate cause of the injury, and where the evidence discloses that the accident occurred when the driver of the car in which the plaintiff's intestate was riding as a guest attempted to pass a car parked on the highway, and that it was struck by the bus on the side of the road properly and lawfully occupied by the bus, with conflicting evidence as to the speed of the bus, and that when the bus stopped it was almost entirely off the hard surface, and that it stopped within its length, and that after the accident the parked car was about the rear of the bus: *Held*, the sole proximate cause of the accident was the improvident attempt of the driver of the car in which the intestate was riding to pass the parked car, and a judgment as of nonsuit was properly entered.

3. **Highways B a—In this case held: contention of plaintiff that defendant was on wrong side of road not supported by allegations or evidence.**

   Where there is no allegation in the complaint in an action to recover damages for the negligent killing of plaintiff's intestate that the defendant's bus which collided with an automobile in which the intestate was riding as a passenger was on the wrong side of the road in violation of statute, the testimony of a witness upon this point is insufficient to deny defendant's motion as of nonsuit when taken in its related parts it tends to show to the contrary.

CIVIL ACTION, before *McElroy, J.*, at September Term, 1929, of FORSYTH.

The plaintiff is the duly appointed administrator of W. A. Burke, Jr., a boy fourteen years of age, who was killed on 16 July, 1928, as the result of a collision between a bus owned and operated by defendant, Carolina Coach Company, and an automobile driven by Mrs. A. B. Pritchard. Plaintiff's intestate was a guest in said automobile, sitting on the back seat at the time of the collision.

Plaintiff alleged that the car driven by Mrs. Pritchard was traveling along highway No. 10 toward Winston-Salem, and had reached a point between Mebane and Graham, approaching a car owned by the defendant, L. B. Capeheart, which was also headed west and parked on the highway. Plaintiff further alleged that the defendant, Capeheart, had parked his car in violation of the law, and that "said Mrs. A. B. Pritchard, necessarily in proceeding along the highway, had to attempt to pass to the left of defendant's (Dr. L. B. Capeheart's) automobile; that while she was attempting to do so, in the exercise of due care, the motor bus of the defendant, Carolina Coach Company, being operated at an unlawful and excessive rate of speed, as above set forth, collided with the automobile in which plaintiff's intestate was riding; that as a result of said collision plaintiff's intestate received injuries, from which he died in less than two hours thereafter." The bus was proceeding from Greensboro toward Durham, and, therefore, in an opposite direction from that in which the car driven by Mrs. Pritchard was traveling.

Plaintiff further alleged that the death of his intestate was proximately caused by the negligence of defendant, Capeheart, "in unlawfully parking his automobile in the public highway," and also as a result "of negligence of defendant, Carolina Coach Company, in operating its motor bus at an unlawful rate of speed and in failing to keep a proper lookout."

The defendants offered no evidence.

The only negligence alleged against the defendant Capeheart was that he had unlawfully parked his car upon the highway.

A witness for plaintiff testified with respect to the Capeheart car as follows: "When I heard the collision I went to the window and looked out, and then hurried up there. When I looked out the window I just saw there was a wreck, and I hurried up there. I saw a car stopped on the highway before the wreck. As well as I remember, it was something between an orange and a yellow car. As well as I remember, the driver of that car had his left arm out of the window, doing something to his windshield. That car was stationary, about half way on and half way off the hard surface of the road. There is room enough there for a car to park off the hard surface road on both sides of the hard surface. I didn't pay much attention to the car that I had seen parked there when I got out to the wreck, but it was to the right, facing my house, on its right, across the hard surface from the bus, about even with the bus, slightly back of it, headed toward Burlington, or Winston-Salem. . . When I got to the scene of the wreck the bus and the car (in which plaintiff's intestate was riding) were together on the bus' right side of the road. Only the left-hand back wheel of the bus was on the hard surface. . . . The road is straight in each direction from the point of

the collision for about three-quarters of a mile. . . . The dark portion of the hard surface road there is about sixteen feet wide. . . The paved portion of the highway, including the border, is about eighteen feet wide. . . . The right-hand front wheel of the bus was slightly off the shoulder, toward the ditch. The bus had started down the slope. . . . If the grade had been steep enough it would have turned over if it had gone any further down. . . . When I got there the bus was entirely off the black portion of the highway and the front wheels were entirely off the light concrete border. . . . When I got there the cars were hooked up, the left front corner of the bus was about the center and nearer to the rear of the Essex. The Essex showed that the impact was made just about the center of the Essex car with the front corner of the bus on the left-hand side. Everything that I saw was on the extreme right side of the highway going toward Mebane and as near the ditch as a car could be driven. . . . The orange or yellow car (Capeheart's car) . . . was about opposite or a little past the center of the bus when I got up there. . . . At least half of it was on the dirt road. . . . The marks of the bus tire were on the hard surface, the asphalt, out in the road, for about the length of the bus, straight from the back tire. I couldn't say whether the bus ran more than its length after the application of the brakes. If there was more than one line of marks I didn't see them. . . . The line I saw was leading from the back wheel of the bus out toward the center of the road. It did lead more than three feet from the edge of the cement toward the center. It led to about where the bus wheel ought to have been if it had been on the hard surface, if it was traveling along in the usual and ordinary way."

Another witness for plaintiff, who was traveling in the same direction with the bus, that is, east toward Durham, testified that it was raining, and that she stopped her car to put up the windows in order to keep out the rain. While parked for this purpose a bus passed her. She testified: "My car was parked about 300 yards from the scene of the collision. I have an opinion as to how fast the bus was going when it passed me. In my opinion it was going between 45 and 50 miles an hour. It was going up grade at that time. After the bus passed me I heard the impact and collision, and I started toward the collision. . . . The road is practically straight at the scene of the wreck. My car was parked in a kind of a dip. . . . I couldn't see the collision from where I had parked my car because of the incline just in front of my car. I had to go over that incline before I could see. . . . From where I had stopped my car up to the straight-away there is right much grade. . . . I was down in the dip. There is considerable grade going up from where my car was parked going east. After you get to the top of the incline the

road is straight for something like a mile. I don't know how fast it (bus) was going, but I think it was going 45 or 50 miles an hour." Another witness for plaintiff testified: "The bus hit the Pritchard car about the back of the front seat, about half way back of the body, and the motor is in front of that. The bus was tilted on account of being driven off the road." Another witness for plaintiff testified: "I saw some skid marks there in the road from this bus. I couldn't tell you how far back of the bus, exactly, but it was at least the bus' length. They started about in the center of the road, but didn't stay in the center. It skidded over to the side. . . . It led off on the right-hand side going toward Mebane. I don't know where the mark ended. It ended under the bus. . . . There were lines from both wheels to the bus, both sets. The one on the right went off in the dirt; there were two sets of lines where it started. It started in the middle of the road, and the right-hand wheels went clear off the asphalt. I saw one line for the left wheels and one for the right. The one for the right wheels started in the center and went clear off the asphalt. The left one started in the center and followed this wheel."

At the conclusion of plaintiff's evidence the judge of the county court nonsuited the case as to both defendants. An appeal was taken to the Superior Court upon assignments of error, and the judge of the Superior Court overruled the assignments of error and entered judgment of nonsuit, from which judgment the plaintiff appealed.

John D. Slawter and Parrish & Deal for plaintiff.
Hastings & Booe and Manly, Hendren & Womble for defendant.

BROGDEN, J. The only allegation of negligence against the defendant, Capeheart, was that his car, referred to in the evidence as the Buick or orange colored car, was parked on the highway in violation of C. S., 2621 (66). There was evidence to the effect that rain was falling and that the defendant, Capeheart, had stopped his car to wipe off the windshield. There was evidence also to the effect that his car was entirely on the pavement, and there was also evidence that his car was partially on the dirt shoulder and partially on the pavement. Assuming, but not deciding, that it is a negligent act to thus stop a car on the highway to wipe off the windshield, there is no evidence that such violation of the statute was the proximate cause of the death of plaintiff's intestate. The car in which plaintiff's intestate was riding did not collide with the Capeheart car, and all the evidence was to the effect that sufficient space was left to enable the driver of the Essex car, in which plaintiff's intestate was riding, to pass the car of defendant Capeheart without injury or inconvenience. The plaintiff relies upon the case of *Dickey v. R. R.*,

196 N. C., 726, 147 S. E., 15. It must be observed, however, that in the *Dickey case* the car in which the injured party was riding actually collided with the train standing across the street in violation of an ordinance. So that, the principle of law declared by the Court has no application to the facts disclosed in the present record, and the judgment of nonsuit as to defendant Capeheart must be sustained.

However, the plaintiff insists that there is sufficient evidence of negligence against the defendant, Coach Company, to carry the case to the jury. The only allegations in the pleadings with respect to the negligence of this defendant are to the effect that the bus was being driven at an excessive speed in violation of C. S., 2618, 2621 (46)a, and C. S., 2621 (51); and further, that the driver thereof did not keep a proper lookout. The evidence discloses that Mrs. A. B. Pritchard was driving an Essex car toward Winston-Salem, and that plaintiff's intestate was riding as a guest therein. Plaintiff alleged as the cause of the collision that "said Mrs. A. B. Pritchard, necessarily in proceeding along the highway, had to attempt to pass to the left of defendant's, Dr. L. B. Capeheart's, automobile; that while she was attempting to do so in the exercise of due care the motor bus of defendant, Carolina Coach Company, being operated at an unlawful and excessive rate of speed, as above set forth, collided with the automobile in which plaintiff's intestate was riding; that as a result of said collision plaintiff's intestate received injury, from which he died in less than two hours thereafter." The evidence discloses that the Essex car in which plaintiff's intestate was riding was struck by the bus about the center thereof and on the left-hand side thereof. In other words, the left-hand side of the bus struck the center of the left-hand side of the Essex car. The evidence further disclosed that the Essex car was struck on the right-hand side of the road, traveling east toward Durham; that is to say, the collision took place on the side of the road properly and lawfully occupied by the bus and on the side that the bus is required by law to travel. When the bus stopped it was almost entirely off the hard surface, and there was testimony to the effect that if it had rolled any further it would have gone into the ditch on its right side. The evidence also disclosed that the bus stopped within its length, and that when the bus stopped the Essex car was hooked up to its front, and the car of defendant Capeheart was standing about the rear of the bus.

There was evidence that in a dip about 300 yards from the point of the collision the bus was running between 45 and 50 miles an hour. There is no evidence as to the speed of the bus immediately preceding the collision. Furthermore, the fact that a heavy bus stopped on a slick surface within its own length must require a stretch of the imagination in order to support a theory that it was running 50 miles an hour at the

time of the impact. If it be conceded that the bus was violating the speed limit at the time of the injury, still the vital question involved is whether the speed was the proximate cause of the injury under the facts disclosed in the record. The theory of the collision alleged in the complaint is that the car in which plaintiff's intestate was riding was attempting to pass the Capeheart car. If so, it was struck by the bus before it completed the act of passing. Therefore, it must be manifest that the bus was perilously near the Capeheart car when Mrs. Pritchard attempted to pass. This is clearly demonstrated by the fact that after the bus stopped the Capeheart car was located slightly beyond the center of the bus.

There is no evidence as to how the injury occurred, and the mere fact of the injury is in itself ordinarily no evidence of negligence. "The breach of a statute is negligence *per se,* but there must be a causal connection between the disregard of the statute and the injury inflicted." *Ledbetter v. English,* 166 N. C., 125, 81 S. E., 1066. Again it has been held in *Chancey v. R. R.,* 174 N. C., 351, 93 S. E., 834, that "the rule was recently stated to be, that however negligent a party is, if his act stands in no causal relation to the injury, it is not actionable." The rule was further stated in *Austin v. R. R.,* 197 N. C., 321, as follows: "There is evidence that death was caused by the impact of the train, but this is not enough to make actionable negligence. Negligence is not presumed from the mere fact that the intestate was killed." In *McNeill v. R. R.,* 167 N. C., 390, 83 S. E., 704, the plaintiff's intestate was killed by a train running without a headlight in violation of the law. The Court wrote: "It is not the absence of the headlight, nor the impact of the train, which determines liability, but the impact of the train brought about by or as the proximate result of the absence of a headlight. To illustrate: Suppose one is at work on an overhead bridge, and without fault on his part he falls on the track 5 feet in front of a rapidly moving train, which is running at night without a headlight, and is killed? Here we have negligence in the failure to have a headlight; but there can be no recovery, because the same result would have followed if there had been a headlight, and its absence has had nothing to do with the injury." *Elder v. R. R.,* 194 N. C., 617, 140 S. E., 298.

In the oral argument plaintiff took the position that there was evidence that the bus was traveling on the wrong side of the road. This position was based upon the testimony of Mrs. Holland, who testified in regard to certain skid marks on the road. She said: "It started in the middle of the road, and the right-hand wheels went clear off the asphalt. I saw one line for the left wheels and one for the right. The one for the right wheel started in the center and went clear off the asphalt. The left one started in the center and followed this wheel." From these

statements it is argued that if the skid mark made by the bus, for the right wheel, started in the center and went clear off the asphalt, or that if the right-hand wheels of the bus were in the center of the road, then of necessity the left-hand wheels were beyond the center in violation of the law. This theory overlooks the next statement of witness, which is: "The left one started in the center and followed this wheel." So that, as a matter of fact, the testimony of witness clearly discloses that the skid marks for all wheels started in the center of the road. Moreover, there was no allegation in the complaint that the bus was traveling on the wrong side of the road.

Upon all the evidence we are of the opinion that the judgment of nonsuit as to both defendants was correct.

Affirmed.

PEOPLES BUILDING AND LOAN ASSOCIATION v. ODESSA RICE SWAIM.

(Filed 27 November, 1929.)

1. **Executors and Administrators B a—Money received by widow as beneficiary of life insurance is not liable for debts of husband.**

   Money received by the widow as beneficiary under the life insurance policy of her deceased husband is not available to the creditors of his estate. Article X, section 7.

2. **Bills and Notes A a—In this case held: nonnegotiable note of widow given for debt of husband was without consideration.**

   Allegation in the complaint that the widow, according to the request of her husband since deceased, has given a written promise to pay his defalcations to the promisee out of the moneys to be derived by her as beneficiary under a policy of life insurance of the husband, without agreement on the part of the promisee not to make claim against the husband's estate, or without other advantage to the promisor or disadvantage to the promisee, both the estate and the widow being insolvent, the written instrument not being a negotiable instrument, there is no prima facie case alleged that will import a consideration for the writing and the other allegations tending only to show a *nudum pactum*, the defendant's demurrer thereto is good.

3. **Same—Preexisting debt of husband is not consideration for nonnegotiable note of his widow.**

   The provisions of C. S., 3005, that a preëxisting debt is sufficient consideration for a promissory note does not apply when the note in question is not negotiable within the meaning of the negotiable instrument law, and the debt was not contracted by the maker, and where the nonnegotiable note is given by a widow for the defalcation of her husband without consideration, it must be alleged and shown that she knowingly accepted profit, advantage or benefit from the transaction.

4. Same—New consideration must be shown to hold widow liable on her nonnegotiable note given for debt of her husband.

In order to hold the widow personally liable for the preëxisting debts of her deceased husband on her nonnegotiable note given by her for their payment, there must be a new consideration given her or forbearance to proceed against his estate, etc.

APPEAL by plaintiff from *Moore, J.*, at September Term, 1929, of DAVIDSON. Affirmed.

The pleadings show substantially the following facts:

1. The defendant Odessa Rice Swaim was married to A. R. Swaim on 10 January, 1924, and on 11 November, 1926, their only child was born, and is now living with its mother.

2. The defendant was the beneficiary of an insurance policy on the life of her husband, issued by the Columbian National Life Insurance Company of Boston, on which after the death of the assured there was paid to the defendant $7,817.75.

3. For about four years before his death A. R. Swaim had been employed by the plaintiff as its assistant secretary; and in June, 1928, it was discovered that in his account with the plaintiff he had defaulted in the sum of $5,918.50. He admitted his default and his making false entries on the plaintiff's books for the purpose of concealing the shortage.

4. On or about 28 June, 1928, A. R. Swaim placed the above-named policy and other papers in a pocket of his automobile, drove into the country, and shot and killed himself while seated in the car. It is alleged by the plaintiff on information and belief that he requested his wife and his brother to see that his deficiency was paid out of his insurance.

5. It is alleged by the plaintiff that the defendant, after the death of her husband, went to the home of A. H. Ragan, secretary and treasurer of the plaintiff, to make some arrangement for paying the deficiency, and returned without consenting or agreeing to any plan; but on the next day it was agreed by her and A. H. Ragan that the defendant would make a note to the plaintiff covering the deficiency, and that it should be paid out of funds to be derived from the insurance policy. It was agreed that the note should be held by the plaintiff without publicity and not be turned over to any bank.

6. On 6 July, 1928, the defendant gave to the plaintiff her promissory note for $5,918.51, payable one day after date, to be paid out of her insurance money. The plaintiff alleged that the defendant had profited by her husband's use of the plaintiff's funds.

7. Defendant alleged that the note in suit had been procured by the plaintiff's fraud and deceit and was not supported by a valuable consideration.

The defendant moved that the action be dismissed for the reason that it appears upon the face of the pleadings that the note was not executed for a valuable consideration. The motion was allowed and judgment was rendered dismissing the action. The plaintiff excepted and appealed.

McCrary & DeLapp and H. R. Kyser for plaintiff.
King, Sapp & King and Spruill & Olive for defendant.

ADAMS, J. It is not suggested that the estate of A. R. Swaim is not liable for the alleged deficiency in his account with the plaintiff; but the money paid Mrs. Swaim as the beneficiary of the policy issued by the Columbian National Life Insurance Company is her individual property and is not subject to the payment of the debts of the deceased or to distribution as a part of the assets of his estate. Constitution, Art. X, sec. 7; *Burwell v. Snow,* 107 N. C., 82; *Cutchin v. Johnston,* 120 N. C., 51. The only question for decision is whether the defendant's note is supported by a valuable consideration or whether it is a *nude pact.*

We find in the pleadings no averment raising a presumption of fact which requires the submission of an issue to the jury. There is no allegation either that the note was under seal or that it was negotiable, and for this reason deemed prima facie to have been issued for a valuable consideration. C. S., 2982, 3004. A nonnegotiable note does not import a consideration. 3 R. C. L., 926, sec. 122. It was incumbent upon the plaintiff to set forth facts sufficient to show that the note was given for value. *Hunt v. Eure,* 188 N. C., 716. The plaintiff's allegations, instead of doing this, tend rather to negative the material fact which should have been stated.

By virtue of a statutory provision an antecedent or preëxisting debt constitutes value. C. S., 3005. The preëxisting debt of the maker, drawer, or acceptor of negotiable paper is undoubtedly a valid consideration for his making, drawing, or accepting a negotiable note or bill of exchange; and the preëxisting indebtedness of the holder to a third party is a sufficient consideration for the endorsement and transfer of the paper to such creditor. 1 Daniel on Negotiable Instruments (6 ed.), sec. 184; *Smathers v. Hotel Co.,* 168 N. C., 69, 72; *Bank v. Seagroves,* 166 N. C., 608. This provision is inapplicable here for the reason that, as we have said, it does not appear from the record that the note sued on is negotiable or that the debt for which it was given was contracted by the defendant. It is not alleged that she knowingly accepted any profit, advantage, or benefit from her husband's wrongdoing. A note given by one person in payment or extinguishment of the debt of a third person

will constitute a valuable consideration; but without discharge, or forbearance, or a new consideration, the mere debt of one person will not support the note of a stranger to the debt. 8 C. J., 219, sec. 354. The pleadings contain no allegation of any agreement by the plaintiff to discharge the estate of the deceased, or to forbear proceedings against his estate to collect the amount of the alleged deficiency. The husband's request that his debt be paid out of his wife's property was not binding on her. A mere moral obligation, though coupled with an express promise, will not constitute a valuable consideration. 1 Daniel on Negotiable Instruments (6 ed.), sec. 182.

While the discharge of a debt due by a third person will as a general rule be deemed a valuable consideration for a bill or note, the debt of a deceased person is not of itself a sufficient consideration to support the personal liability of the widow, or a distributee, or of a personal representative of the deceased. 8 C. J., 222, sec. 358. This doctrine has often been maintained and applied. In *Paxson v. Nields,* 187 Pa. St., 385, 21 A. S. R., 888, it was held that a note given by a widow for the payment of a debt due by her husband, who was insolvent at the time of his death, without a new consideration to support it, was void and, of course, not enforceable. Substantially the same conclusion was reached in *Gilbert v. Brown,* 97 S. W. (Ky.), 40, 7 L. R. A. (N. S.), 1053, and in *Maul v. Vaughn,* 45 Ala., 134. It was shown in the latter case that a judgment debtor, who owned a plow and saddle horse, died insolvent, leaving a widow and an infant child. The widow used the horse without taking out letters of administration on the estate. She executed a note in settlement of the judgment, the creditor's agent telling her that because she had used the horse she was liable for the debt. Without her request he receipted the judgment. The Supreme Court of Alabama held that the note was without consideration, though it would have been supported by value if the judgment had been receipted by request of the widow. The principle was adhered to in *Watson v. Reynolds,* 54 Ala., 191. There the note was given by the widow of a deceased debtor to his creditor; but the creditor did not cancel the debt, or lose, or suspend any remedy he had against the estate. The Court decided that the note was without consideration. See *Felton v. Reid,* 52 N. C., 269; *Long v. Rankin,* 108 N. C., 333; *Wilcox v. Arnold,* 116 N. C., 709.

The principles underlying these decisions must control in the case before us. There was no new consideration for the defendant's note. The initial debt was not canceled and the plaintiff is not precluded from proceeding against the debtor's estate. The widow by executing the note has received no benefit; she has acquired nothing from her husband's estate that she would not have been entitled to if she had not given the note. The estate of A. R. Swaim is insolvent, and so is the

defendant. The transaction in question, as was said in *Paxson v. Nields, supra,* was "a one-sided affair, and exclusively for the benefit" of the plaintiff. The alleged promise to keep it secret was sentimental rather than valuable; and in any event there is no allegation of the plaintiff's compliance with such promise. The judgment is

Affirmed.

AMERICAN EXCHANGE NATIONAL BANK v. HELEN M. WINDER, JOHN C. WINDER AND WILLIAM T. WINDER.

(Filed 27 November, 1929.)

1. Estoppel C a—Distinction between equitable and legal estoppels in pais.

Equitable and legal estoppels agree in that they preclude a person from showing the truth in an individual case; but legal estoppel shuts out the equity and justice of the individual case in its operation, while equitable estoppel prevents a person from asserting his rights under a technical rule of law when his conduct has been such as in good conscience should prevent him from alleging and proving the truth.

2. Same—Intent to mislead is not essential to equitable estoppel.

The intent to mislead is not an essential element in the doctrine of equitable estoppel *in pais,* nor is fraud and representation in all cases requisite, and the acts, conduct, and even silence of the party sought to be estopped may be adequate.

3. Same—Where one clothes another with indicia of title to personalty he is estopped as against innocent third person.

Where the owner of personal property clothes another with the *indicia* of title, or allows him to appear as the owner, or as having the power of disposition, an innocent third person dealing with the apparent owner, and who has been deprived of his rights thereby, will be protected under the equitable doctrine of estoppel *in pais.*

4. Same—In this case held: doctrine of equitable estoppel applies.

Where one having an inherited interest in diamonds gives the possession of the diamonds to his brother, and permits the wife of the latter to wear them as her own for years without claiming them, and after a separation from her husband she hypothecates them at a bank for the security of her personal note given for borrowed money, the evidence is sufficient to be submitted to the jury as to whether the bank in lending her the money was reasonable in relying upon or inferring the fact that all the diamonds were her own, and estop her brother-in-law from showing to the contrary in an action by the bank to subject the diamonds to the payment of her note.

CONNOR, J., dissents.

BANK *v.* WINDER.

APPEAL by William T. Winder from *Clement, J.*, at April Term, 1929, of GUILFORD. No error.

The plaintiff brought suit on two promissory notes under seal, payable to its order, executed by the defendant, Helen M. Winder. The first was in the sum of $3,335.05, was dated 16 October, 1927, and was payable 28 November, 1927; the second was given for $690, was dated 26 December, 1927, and was payable thirty days after date. The maker of the notes authorized the payee to hold all securities put up for payment as security for all her indebtedness to the payee whether incurred before or after the execution of the notes. She filed an answer to the complaint, alleging that the original debt of $5,000, contracted in 1920, was that of her husband, John C. Winder, and that he procured her endorsement of a note in this amount and obtained from her four diamonds which he deposited with the plaintiff as collateral security. She alleged that her husband had given her one of the diamonds as an engagement ring and had given her the others some time after the death of his mother; also that in May, 1926, her husband executed a deed of separation admitting her title to the diamonds and agreeing to pay the amount of the note, but upon his failure or refusal to make payment she was forced to renew the note. When the diamonds were pledged there was due the bank $1,800, but an additional loan was made increasing the debt to $5,000, which was subsequently reduced to $3,335. Mrs. Winder admits that as collateral security for the note of $690, which was given for her individual debt, she deposited with the plaintiff her diamond pendant. The answer to the first issue is made up of these two sums. She asks that all the stones be sold under an order of court, that the proceeds be applied to the payment of her notes, and that the surplus, if any, be paid to her.

John C. Winder filed no pleading. William T. Winder filed an answer admitting the execution of the notes and the deposit of the diamonds with the plaintiff; but he alleged that he owns a one-half interest in the pendant and in all the other diamonds except Mrs. Winder's wedding ring, and that his title is not and cannot be affected by her disposition of them.

The issues were answered as follows:

1. What amount, if any, is the plaintiff entitled to recover of the defendant, Helen M. Winder? Answer: $4,025.05, with interest on $3,335.05 from 28 December, 1927, and interest on $690 from 25 January, 1928.

2. Did the defendants, Helen Winder and John Winder pledge with the plaintiff as collateral security for the debt sued on, the property described in the complaint? Answer: Yes.

3. Is the defendant, William T. Winder, the half owner of any of said property, and if so, which? Answer: Yes, all diamonds except Helen Winder's engagement diamond.

4. If so, is the said William T. Winder estopped as against the plaintiff in this cause from asserting any claim thereto? Answer: Yes.

Judgment was rendered for the plaintiff, and William T. Winder appealed.

Brooks, Parker, Smith & Wharton for plaintiff.
King, Sapp & King for William T. Winder.

ADAMS, J. The fundamental question is whether there is enough evidence to sustain the jury's answer to the fourth issue; for if the appellant is estopped as against the plaintiff to assert title to the property in controversy only a few of the exceptions need be considered. The answer may be found in the doctrine of estoppel.

We are not concerned with estoppel by record or by writing, but with estoppel *in pais—i. e.,* equitable estoppel. While equitable estoppels arise from facts which are matters *in pais,* there is an essential and marked distinction between them and legal estoppels *in pais.* The two agree in that they preclude a person from showing the truth in an individual case; but while legal estoppel, in shutting out the truth, shuts out also the equity and justice of the individual case, equitable estoppel, which is available in an action at law, is admitted on the opposite ground of preventing a person from asserting his rights under a technical rule of law when his conduct has been such as in good conscience should prevent him from alleging and proving the truth. Eaton's Equity, 2 ed., 147, sec. 60; *Dickerson v. Colgrove,* 100 U. S., 578, 25 Law Ed., 618.

Equitable estoppel is defined as "the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy. This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." 21 C. J., 1113, sec. 116; *Boddie v. Bond,* 154 N. C., 359. Neither fraud nor representation in express words is in all cases a requisite. Conduct, acts, or even silence may be adequate. Nor is it necessary that the conduct

of the person estopped be prompted or characterized by an intention or expectation that it will be acted upon by the other party. His conduct will be effective as an estoppel if the circumstances are such as may lead to the natural and probable conclusion that it will be acted upon as implying an existing fact. Pomeroy says there are conditions in which it is impossible to ascribe to the party estopped any intention or even expectation that his conduct will be acted upon by one who afterwards claims and is entitled to the benefit of the estoppel; that it would be misleading to say there must always be an intention that any particular conduct should be acted upon; and that while such intention must sometimes exist there are estoppels in which no intention can exist. If representations, whether by words, conduct, or silence, are such that all persons interested in the subject have a right to rely upon them, their truth cannot be denied by the party making them against any one who trusted to them and in good faith acted upon them. Pomeroy's 2 Equity Jurisprudence, secs. 805, 811. In *Armfield v. Moore,* 44 N. C., 158, *Pearson, J.*, remarked that this principle lies at the foundation of all fair dealing between man and man, and that without it, it would be impossible to administer the law as a system. The three requisites are that the defendant knows his title, that the plaintiff does not know it, and that, relying upon the defendant's representations or silence, the plaintiff is thereby deceived. *Holmes v. Crowell,* 73 N. C., 613; *Exum v. Cogdell,* 74 N. C., 139.

It is important to remember that the owner of personal property will not be estopped merely by entrusting its possession to another. Possession or control of the property is not of itself sufficient for this purpose. If it were, as was said in *Forristal v. McDonald,* 9 Cam., S. C., 9, no man could safely leave his watch with a watchmaker for repairs. See 7 A. L. R., 676 N. But an estoppel will arise against the real owner when he clothes the person assuming to dispose of the property with the apparent title to it, and the person setting up the estoppel, relying upon the fact, parts with something of value or extends credit on the faith of such apparent ownership. 10 R. C. L., 777, sec. 91. The controlling principle is this: Where the owner of personal property clothes another with the *indicia* of title, or allows him to appear as the owner, or as having the power of disposition, an innocent third party dealing with the apparent owner will be protected. *Drew v. Kimball,* 80 A. D., 163; *Guffey v. O'Reilley,* 57 A. R., 424; *Velsian v. Lewis,* 3 A. S. R., 184; *Hill v. Wand,* 27 A. S. R., 288; *First Nat. Bank v. Kissaire,* 132 A. S. R., 644; *O'Connor v. Clark,* 29 L. R. A., 607.

Let us apply these principles to the evidence. The appellant, William Winder, claims to be the owner of a one-half interest in all the diamonds

except the one in the wedding ring. He and John C. Winder are brothers, the only children of Florence Tucker Winder, who died 2 May, 1916. They did not divide the jewelry received from her estate. The appellant testified: "I agreed to let John and Helen use the jewelry until such time as I desired to have my part. I say use it, wear it, in other words, take care of the jewelry until I wanted my portion. I did not authorize them to pledge it in any way as security." John C. Winder and his wife then lived in Raleigh; afterwards they moved to Greensboro. William was in "another part of the country." From time to time he came to North Carolina, and in 1923 and 1924 lived in Greensboro. He knew Mrs. Winder wore the jewels, and he made no objection to her "wearing and using them." Again he went away. "On a stretch," he said, "I never heard from my brother in six years. We have never been very close together because there was so much difference in our ages, and we never had a home." He did not demand the jewels or request a division of them for about twelve years, and then only after hearing that John C. Winder and his wife had separated. The uncontradicted evidence is that Mrs. Winder wore the diamonds "all the time," "as if they were hers," and that the officers of the bank knew she had worn them for several years.

The evidence unquestionably tends to show that John and William Winder had clothed Mrs. Winder with the *indicia* of title to the diamonds and had allowed her to appear as the owner with full power of disposition. Upon this theory it was of sufficient probative force to be considered by the jury on the question of estoppel, although the rule generally applied in transactions of this character is that which declares that when one of two innocent persons must suffer for the wrong of another, he who has armed the wrongdoer must suffer the loss. 25 L. R. A. (N. S.), 770 N.

Several exceptions related to the trial court's alleged disregard of the mandate (C. S., 564) that the judge shall state the evidence and apply the law; but we do not regard the charge as subject to this criticism. The remaining exceptions, which have been examined in their relation to the whole record, point out no error which requires another trial.

No error.

CONNOR, J., dissents.

RAYMOND K. RHODES v. MARVIN COLLINS, ZEB O'CONNELL AND CHAS. O'CONNELL, AND O. H. JOHNSON v. MARVIN COLLINS, ZEB O'CONNELL AND CHAS. O'CONNELL.

(Filed 27 November, 1929.)

1. **False Imprisonment A a—False imprisonment is depriving person of liberty without legal process—Malicious Prosecution.**

   False imprisonment is depriving one of his liberty without legal process, and malicious prosecution is a prosecution founded upon legal process, but maintained maliciously and without probable cause.

2. **False Imprisonment A b—In this case held arrest was made.**

   Where the uncontroverted evidence in an action for false arrest or imprisonment is to the effect that the defendants procured from a justice of the peace a warrant for the arrest of the plaintiff and accompanied the process officer who made the arrest and took the plaintiff before the magistrate, and that the plaintiff was required to and gave bond for his appearance, it is not error for the court to instruct the jury that if they believed the evidence to answer the issue as to the false arrest in the affirmative.

3. **False Imprisonment A c—Warrant for slander is void and arrest made thereunder is without legal process.**

   Slander of a man is not a criminal offense under our law, and where a warrant for arrest has been procured from a justice of the peace who erroneously issues it, and the parties charged have been arrested and have given bond for their appearance, the warrant under which the arrest was made is void and the plaintiff in a civil action for false arrest thereunder may recover such actual damages as he may have sustained, and the question of good faith in the procurance of the warrant may bear upon the measure of damages, but is not a defense to the action.

APPEAL by defendant, Chas. O'Connell, from *Grady, J.*, and a jury, at January Civil Term, 1929, of WAKE. No error.

We gather from the record that this is an action for false arrest or false imprisonment and malicious prosecution, brought by plaintiff against defendants. The record discloses that summons was served only on Marvin Collins and Chas. O'Connell, and the action was tried out against them. The evidence on the part of plaintiffs was to the effect that some time prior to the institution of this action, they were arrested at their several homes in Wake County, on the night of 26 October, 1926, about nine or half past nine o'clock, and after the families had retired, upon a warrant issued by R. H. Templeton, justice of the peace, sworn to and signed by the defendants, Collins and Charles O'Connell and Zeb O'Connell, a son of Charles O'Connell, charging plaintiffs with slander. That the warrant was given to Mack Page, a deputy sheriff, who was accompanied by the defendant, Marvin Collins, and plaintiffs were notified of the charge, and they went with the deputy sheriff several miles, at night, to the home of the justice of the peace that issued the

warrant and were made to give bond for their appearances at a subsequent time. It was contended by defendants that they went voluntarily to the justice of the peace, but the record discloses that they gave bond for their appearance.

The warrant sued out and signed by defendants and Zeb O'Connell was to the effect that plaintiffs had charged "that Zeb O'Connell and Marvin Collins, one of the defendants employed by Charles O'Connell, had stolen and were stealing seed cotton off the wagons of the patrons of the Charles O'Connell gin."

The justice of the peace testified: "That he was the justice of the peace who issued the warrant; that the defendants in this case came to him and told him what reports had been circulated by the plaintiffs, and that he prepared an affidavit for them to sign, which was introduced in evidence; that he prepared a warrant upon his own understanding that the matters set up in the affidavit constituted a criminal offense against the laws of North Carolina, and issued the same to the deputy sheriff; that at the trial he was informed by the attorney for the prosecution that it was not an offense, and at his request dismissed the warrant; that the plaintiffs, not being under custody at the time, went off and secured bondsmen for their appearance at the trial."

By consent the actions were consolidated and tried together.

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the defendants wrongfully cause the plaintiffs to be arrested under a void warrant? Answer: Yes.

2. If so, what actual damages is the plaintiff, Johnson, entitled to recover of the defendants? Answer: $200.

3. If so, what actual damages is the plaintiff, Rhodes, entitled to recover of the defendants? Answer: $100.

4. Was the arrest of the plaintiffs procured by malice, as alleged in the complaint? Answer: No.

5. If so, what punitive damages is the plaintiff, Johnson, entitled to recover of the defendants? Answer: .....

6. If so, what punitive damages is the plaintiff, Rhodes, entitled to recover of the defendant? Answer: ....."

B. C. Beckwith and W. F. Evans for plaintiffs.

A. A. F. Seawell for defendant, Chas. O'Connell.

CLARKSON, J. We have read with care the record. The allegations of the complaint appear to set out a double-barrel action permissible under our liberal practice, "Wrongful and malicious prosecution, false arrest and wrongful detention," and tried out on false arrest and imprisonment.

"False imprisonment" is based upon the deprivation of one's liberty without legal process, while malicious prosecution is for a prosecution founded upon legal process, but maintained maliciously and without probable cause. *Rosendale v. Market Square Dry Goods Co.* (Mo.), 213 S. W., 169, 171. *Allen v. Greenlee,* 13 N. C., 370.

The assignment of error by defendant to the effect that the court below assumed and charged as a fact that plaintiffs had been arrested cannot be sustained.

We think from the undisputed evidence there was an arrest. The parties charged went with the officer and one of the prosecutors, at night, to the justice of the peace who issued the warrant and gave bond for their appearance. They were *in durance vile.*

In *S. v. Lunsford,* 81 N. C., at p. 530, speaking to the subject, we find: "Where a constable showed a magistrate's warrant to the prosecutor and desired him to go before the magistrate, which he did without further compulsion. This was held to be a sufficient imprisonment, because the officer solicited a warrant for his arrest, and in going with him, he yielded to what he supposed to be a legal necessity. But there must be a detention, and the detention must be unlawful. 3 Bl. Com., 127." *Mead v. Young,* 19 N. C., 522; *Haskins v. Young,* 19 N. C., 527; *Riley v. Stone,* 174 N. C., 588; *Stancill v. Underwood,* 188 N. C., 475; 25 C. J., 455-6.

The defendant assigned error to the following part of the charge made by the court below: "There is no law making it a criminal offense for a man to slander another man; I hold, therefore, this warrant was absolutely void, and of no effect whatever, and it did not justify the arrest of these parties; and, therefore, upon the admission of the parties made in their pleadings and upon the stand, I direct you gentlemen to answer the first issue Yes, if you find as a fact the facts to be as testified to, by all the witnesses who have gone upon the stand in this case, and it would make no difference whether they were actuated by good faith or not, slander not being an indictable offense; the arrest of these defendants under this warrant was an invasion of their rights, and, therefore, on the admission of the parties, it would be your duty to answer the first issue Yes, that it was an unlawful arrest, and the arrest being an unlawful act, procured by these two defendants, it being an invasion of the rights of the plaintiffs, they would be entitled, as a matter of law, to what we call actual or compensatory damages, for such as they naturally suffered by reason of such unlawful arrest."

The serious question arises on the record: The warrant does not charge a crime under the laws of this State. The evidence was all to the effect that it was taken out in good faith by the prosecutors. In such a case,

can the prosecutors justify their act on the ground that the warrant was procured in good faith? We cannot so hold.

We find the authorities in woeful conflict in other states, but not in this jurisdiction. The common law, which we have adopted in this State, was ever jealous of the personal liberty of the citizens. C. S., 970. Our Constitution condemns general warrants. Const. of N. C., Art. I, sec. 15.

"If the imprisonment is under legal authority it may be malicious, but it cannot be false. This is true where legal authority is shown by valid process, even if irregular or voidable. Void process will not constitute legal authority within this rule." 25 C. J., *supra,* 445-6.

"Where defendant complainant caused plaintiff's arrest and detention under a warrant in the issuance of which defendant actively participated and which was illegal because not fulfilling certain statutory requirements, it was held in reversing a judgment for plaintiff in malicious prosecution that the warrant under which plaintiff was arrested being void, the proper remedy was false imprisonment, and not malicious prosecution. *McCaskey v. Garrett,* 91 Mo., A., 354.

Ruffin, J., in *Allen v. Greenlee,* 13 N. C., p. 370-1, said: "If one person cause another to be arrested without process, it is trespass and false imprisonment. So if he arrest him upon process that is void in itself, or is issued by a court or magistrate having no jurisdiction. An action for malicious prosecution, on the other hand, is a special action on the case, for the abuse of the process of law, from malicious motives. It presupposes valid process, and case is given because trespass will not lie. It is given against the party suing it out, because the hand which executes the process is justified by it and is not guilty of a trespass. There being no other remedy, this special action is provided. In the case before us, the propriety of this rule is made very manifest. The charge in the warrant is for a mere civil injury, of which a justice of the peace has no jurisdiction. It constitutes no crime. But every fact alleged in the warrant is fully proved. That did not justify Greenlee in taking it out; because admitting the facts to be true, the magistrate could not take cognizance of the case, since it was not an indictable offense, nor a private wrong which he could redress." This principle is approved in *Zachary v. Holden,* 47 N. C., 453. *S. v. DeHerrodora,* 192 N. C., 749.

In *Bryan v. Stewart,* 123 N. C., at p. 96, the law as stated: "At common law there were two actions for an illegal arrest—one was where there was no legal excuse or justification for making the arrest, as where it was made without legal process, or, if made under the form of legal process, where the same was absolutely void. This was an action of trespass *vi et armis.* The other was where the process was erroneous,

but not absolutely void. This was an action of trespass on the case, and was subject to the rules and requirements, as if it were an action for malicious prosecution. Bishop on Contract Law, sec. 211; Corman Emerson, 71 Fed. Rep., 264; Pollock on Torts, 148."

The principle above is laid down in the *Bryan case,* but that case is distinguishable from the case at bar. The *Bryan case* was an order of arrest in a civil action, and the clerk was acting in his judicial capacity.

In *Wingate v. Causey,* 196 N. C., p. 72, the observation is made: "Three things must be alleged and proved in an action for malicious prosecution: (1) malice, (2) want of probable cause, and (3) termination of proceedings upon which the action is based. *R. R. v. Hardware Co.,* 138 N. C., 174, 50 S. E., 571." In false arrest or imprisonment all that need be shown is deprivation of one's liberty without legal process.

The present action was properly tried out as false arrest or imprisonment, and not malicious prosecution—which premises that the process is not void but irregular, erroneous or voidable. From the authorities in this jurisdiction, the charge of the court below was correct. The action was one for false arrest or imprisonment, and the warrant was void; it charged no criminal offense known to the law. The question of good faith has nothing to do with the charge of false arrest or imprisonment; it is presumed that the law is known to all, but good faith is very material on the question of damages. The charge on the measure of damages was correct. *Waters v. Tel. Co.,* 194 N. C., 188. A leading case contrary to the principle herein set forth is *Whaley v. Lawton,* 62 S. C., 91, 56 L. R. A., 649, but in that case there was a strong dissenting opinion.

As a rule, as in the present action, where defendants act in good faith, the jury give small actual or compensatory damages. We can see no reason in law for disturbing the judgment. There is

No error.

JOHN L. SHORTER v. MOORESVILLE COTTON MILLS.

(Filed 27 November, 1929.)

1. Master and Servant C e—There is presumption of law that master has properly performed duty in employing his workers.

In an action by an employee to recover damages from his employer for a personal injury caused solely by the negligence of another employee, the presumption of law is that the employer has properly performed his duty in employing his workers and is not responsible for injuries to an employee attributable solely to the negligence of a fellow-servant.

2. Same—Where master has notice of incompetence of servant he is liable for injury caused by such servant to another.

An employer impliedly contracts that he will engage the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and where the master has had express notice of the unfitness of an employee to safely perform the duties intrusted to him, the master is culpably negligent in continuing to employ such servant, and is responsible in damages to another employee who has been injured as a result of the unfitness of the servant.

3. Same—In this case held: evidence of notice to the master of the incompetency of servant was sufficient to be submitted to the jury.

Where the evidence in an action against the master for injuries inflicted by a fellow-servant shows that on the morning of the day the plaintiff, an employee of the defendant, was injured he complained to his overseer of the carelessness and incompetency of a fellow-servant, he had done all that he was required to do under the circumstances, and viewing the evidence in the light most favorable to the plaintiff, it must be assumed that his complaints were made in good faith, and it is sufficient evidence of express notice to the master to be submitted to the jury.

4. Master and Servant C f—Assumption of risk is ordinarily question for jury.

In an action against the master for a personal injury negligently inflicted on a servant through the negligence of a fellow-servant, the question as to whether the servant inflicting the injury was so obviously reckless and incompetent that no person of ordinary prudence would continue to work with him, is ordinarily one of fact for jury upon the issue of assumption of risk.

CIVIL ACTION, before *Sink, Special Judge,* 10 June, 1929, Special Term of MECKLENBURG.

The defendant is engaged in the manufacture of cotton, and the plaintiff brought this suit alleging that he was injured by the negligence of defendant on 16 April, 1928. The particular negligence alleged was that the defendant furnished to the plaintiff an incompetent fellow-servant whose carelessness and incompetency was known to the defendant or should have been known by the exercise of ordinary care.

The evidence tended to show that on 16 April, 1928, the plaintiff was adjusting or grinding cards in the mill of defendant. A card, according to the evidence, is a machine with a cylinder thirty-six inches in diameter. Over the cylinder one hundred and ten flats revolve, and when a flat is taken out that leaves the cylinder exposed, "and in order to make this gauge one-twelve-thousandths of an inch, you gauge it and see if you can feel the flats in that small amount of gauge, and that is what I was doing when I got hurt. I was standing there with my hand up to the flats and setting the gauge between the flats and the cylinder. . . . I was supposed to adjust it if it was not setting properly. While I was

doing this, I don't know what happened; my hand was caught and I could not imagine what was holding to it. I saw the belt was off, and I did not know how in the world that could start with no belt on. The machine started while I was doing that. . . . When the machine started up my hand was in between the flats exposed to the cylinder. . . . The machine is driven, when in operation, by a belt, from the main shaft. The belt was off and tied up. . . . I don't know how it started. I know it caught my hand. I am positive that it was not started by the belt. It grabbed my hand and I could not pull it out, and the cylinder turning was just biting the meat off and tore all the meat off the top of my hand."

Another witness testified in behalf of plaintiff, as follows: "He got hurt on the card machine, after I gave him the gauge. I just turned around and walked off and got out in the front alley and heard him holler, and I turned around and he was pulling, trying to get out. When I got back to the card the cylinder was still pulling. He told me to stop it, and I took hold of it to stop it, and it was hard to stop, and I noticed that boy over there ahold of it pulling it—he was pulling it the wrong way. When I saw Pruitt he was pulling at the cylinder, turning it. He was pulling at the pulley on the cylinder. . . . Pruitt said he was backing the cylinder off the man's hand, but he was pulling it the wrong way."

Plaintiff further offered evidence tending to show that he was injured in the afternoon, but that on the morning of the day he was injured at about 7:30 or 8 o'clock he complained to Mr. Wilson, his overseer, that Pruitt was dangerous and incompetent. Plaintiff testified that he told Mr. Wilson: "You ought to put somebody else over here; that man is dangerous; he is going to hurt somebody or hurt himself before the day is gone." Plaintiff further testified that previously he had seen Pruitt playing with the pulleys and shafting in the mill, meddling around the machinery. Plaintiff further testified that he had complained to his overseer, Mr. Wilson, twice on the day he was injured about the carelessness and incompetency of Pruitt, his fellow-workman.

The defendant offered strong evidence contradicting the evidence of plaintiff. Pruitt testified for the defendant that he did not injure the plaintiff by turning the pulley, but that plaintiff started up the machine and was the author of his own injury. The agents of defendant denied that the plaintiff had made complaint as to the incompetency of Pruitt, or that they had any knowledge of his carelessness.

Issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered in favor of plaintiff. The verdict awarded damages in the sum of $2,250.

From judgment upon the verdict the defendant appealed.

Jake F. Newell and Stewart, MacRae & Bobbitt for plaintiff.
Z. V. Turlington and Pharr & Currie for defendant.

BROGDEN, J. The right of plaintiff to recover damages in this action is based upon the theory that Pruitt, a fellow-servant, was incompetent, reckless and dangerous, and that Pruitt carelessly turned the pulley when the hand of plaintiff was exposed in a dangerous machine, and thereby inflicted serious and permanent injury.

The law presumes that an employer has properly performed his duty in employing his workers, and, therefore, he is not responsible for injuries to an employee attributable solely to the negligence of a fellow-servant. This principle was declared in *Walters v. Lumber Co.,* 163 N. C., 536, 80 S. E., 49, as follows: "The presumption is that the employer has properly performed his duty in the respect suggested, and before responsibility can be fixed on him it must be established by the greater weight of the testimony that the employee has been injured by reason of the carelessness or negligence due to the incompetency of a fellow-servant; that the master has been negligent in employing or retaining an incompetent employee after knowledge of the fact, either actual or constructive." The principle thus announced is fully supported by the decisions of the appellate courts and by all the leading textwriters.

In the case at bar, there is no evidence that the defendant was negligent in employing Pruitt. So that the liability of the defendant must rest upon either actual or constructive notice of the incompetency and carelessness of the servant complained of. The evidence shows that on the morning of the day he was injured plaintiff complained to his overseer of the carelessness and incompetency of Pruitt. Therefore, the plaintiff had done all that he could be required to do under the circumstances. He had no power to discharge Pruitt, and viewing his evidence in its most favorable light, it must be assumed that his complaints were made in good faith. These complaints were sufficient evidence of express notice to be submitted to the jury.

Nor in view of the facts disclosed by the record can the plaintiff be denied recovery as a matter of law by the application of the principle of assumption of risk. Upon this aspect of the case the law was settled in *Walters v. Lumber Co.,* 165 N. C., 388. The Court quoted with approval the following: "The hiring or retention of a servant whose unfitness for his duties, whether it arises from his want of skill, his physical and mental qualities, or his bad habits, if known, actually or constructively, to the master, is culpable negligence, for which the master must respond in damages to any other servants who may suffer injury through that unfitness. The essential ground upon which the liability thus predicated is based is that 'the master impliedly contracts that he will use due

care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service.'" The Court adding: "It therefore makes no difference that Milton Carden, whose negligence caused the injury, was a fellow-servant of the plaintiff, as the jury must have found that he was incompetent and that the master knew it before the plaintiff was hurt in the operation of the machine."

The question as to whether the recklessness of Pruitt was so obvious and injury therefrom so imminent that no person of ordinary prudence would continue to work with him, was a question of fact for the jury. *Maulden v. Chair Co.*, 196 N. C., 122, 144 S. E., 557.

Upon a consideration of the entire case we find no reversible error.

No error.

MAMIE G. FEASTER v. McLELLAND STORES COMPANY AND C. H. ANDERSON.

(Filed 4 December, 1929.)

1. Removal of Causes C b—In this case held: joint tort was alleged and petition for removal should have been denied.

Where the plaintiff in her complaint alleges that she was injured by the negligence of the nonresident defendant in failing to provide a reasonably safe entrance to its store and the negligence of the resident manager in failing to maintain the same in a reasonably safe condition, over which the resident manager had control for his employer, a joint and not a severable tort is alleged as to both defendants, and the petition of the nonresident defendant for removal from the State to the Federal Court upon the ground of separable controversy should be denied.

2. Same—In this case held: petition for removal on ground of fraudulent joinder should have been denied.

Where the complaint alleges that the negligence of the resident and nonresident defendants concurred in causing the injury in suit, a joint tort is alleged, and it will not be considered as separable because in some respects the allegations of negligence alleged against the nonresident defendant may be of matters of which the resident defendant was only partially responsible, and it will not be held a fraudulent joinder to prevent the removal of the cause from the State to the Federal Court.

APPEAL by plaintiff from order of *Sink, Special Judge,* at September Term, 1929, of MECKLENBURG. Reversed.

This action was heard upon the petition of the McLelland Stores Company, a corporation organized under the laws of the State of Delaware, and doing business in this State, for the removal of the action from the Superior Court of Mecklenburg County, North Carolina, to the

District Court of the United States for the Western District of North Carolina, for trial, upon the ground that the cause of action alleged in the complaint is separable as between the defendants, and also upon the ground that its codefendant, C. H. Anderson, a resident of this State, was joined by plaintiff as a defendant in the action for the fraudulent purpose of depriving the petitioner of the right to its removal from the State Court to the Federal Court, under the act of Congress.

From the order removing the action in accordance with the prayer of the petitioner, plaintiff appealed to the Supreme Court.

John M. Robinson and Frank R. McNinch for plaintiff.
Stewart, MacRae & Bobbitt for defendant.

CONNOR, J. The defendant, McLelland Stores Company, is a corporation, organized under the laws of the State of Delaware; on and for some time prior to 25 February, 1927, the said company was engaged in the business of operating and conducting a store for the sale of merchandise, by retail, at Gastonia, N. C. The defendant, C. H. Anderson, a resident of this State, was the manager of said store, and as such manager had charge and supervision of said store.

Plaintiff, in her complaint, alleges "that at the times mentioned in this complaint, it was the duty of the defendant, C. H. Anderson, to supervise and inspect the store referred to in paragraph 4 hereof, and to exercise reasonable care to see that said store was placed and kept in a reasonably safe condition for the protection of the vast number of people who passed in and out of said store upon the invitation of the said Anderson and his codefendant."

"7. That on or about 25 February, 1927, the plaintiff, upon the invitation of defendants, went into the store referred to in paragraph 4 hereof; that as plaintiff was attempting to leave the store through one of the front doors thereof, she was knocked off her balance, and slipped down by reason of the negligence of the defendants as hereinafter more specifically set forth, and was thereby injured and damaged as hereinafter described."

Plaintiff alleges that she was injured by the joint and concurrent negligence of defendants, in that

"(a) They failed in the exercise of reasonable care to keep the said store, including the entrance and exits thereof, in a reasonably safe condition;

(b) They constructed and maintained the entrance to said store of tile placed upon an incline and allowed said entrance to become and remain in a slick, slippery and dangerous condition;

(c) Although they invited and encouraged vast numbers of people to use said entrance, they failed to adopt and employ suitable means to place and keep said entrance in a reasonably safe condition;

(d) They installed in said entrance dangerous and unsafe doors, and failed to equip said doors with safety appliances which were known, approved and in general use;

(e) They failed to equip said doors with devices which would check the speed thereof and prevent them from swinging with force and violence against persons using or attempting to use said entrance;

(f) They equipped said doors with springs of such strength and power as to cause said doors to swing back and forth with great force and violence and in such a manner as to jeopardize the safety of persons attempting to use said entrance;

(g) Although they knew or ought to have known that said doors swung back and forth with great force and violence, in such a way and manner as to endanger the safety of persons using or attempting to use said entrance, they failed to install on said doors any device, and failed to take any means to check the speed of said doors;

(h) They failed to warn patrons of said store in reference to the dangers arising from the conditions at said entrance hereinbefore more fully described."

Plaintiff alleges that as the result of the injuries which she sustained by reason of the negligence of defendants, she was damaged in the sum of $20,000.

The allegations of the complaint are sufficient to constitute a cause of action upon which both defendants are liable. It may be that the resident defendant cannot be held liable for some of the acts of negligence alleged in the complaint; if he is not liable for damages caused by the defective construction of the door and entrance to the store, he is liable for damages caused by his negligence in failing to exercise reasonable care to keep the said entrance in a reasonably safe condition for the use of customers and patrons of the store, and also in failing to exercise reasonable care to warn such customers and patrons of the dangers incident to the use of the door and entrance, which plaintiff alleges were negligently constructed by his codefendant and employer. Plaintiff has elected to allege in her complaint a cause of action upon which defendants are liable as joint *tort-feasors*. In such case, it is well settled that the cause of action is not separable for the purpose of removal from the State Court to the Federal Court, upon the petition of a defendant, who is a nonresident of the State in which the plaintiff resides and in which the action is brought. *Crisp v. Fibre Co.*, 193 N. C., 77, 136 S. E., 238, and cases cited in the opinion by *Stacy, C. J.*

Nor is this action removable from the State Court to the Federal Court, for trial, upon the ground of a fraudulent joinder of the resident defendant. It appears upon the record that the resident defendant was the manager of the nonresident corporation, and had control and supervision of the store, including the door and entrance. If, as alleged in the complaint, he failed to exercise reasonable care to maintain both the door and the entrance to the store in a reasonably safe condition, for the use of its customers and patrons, and such failure was the cause of plaintiff's injury, or contributed to such injury, both he and his codefendant are liable for the damages resulting from her injuries. Upon the facts appearing on the record, it cannot be held that the joinder of the resident defendant in this action was for the fraudulent purpose of depriving the nonresident defendant of its right of removal under the act of Congress. *Givens v. Manufacturing Co.*, 196 N. C., 377, 145 S. E., 681; *Swain v. Cooperage Co.*, 189 N. C., 528, 127 S. E., 538.

There was error in the order for the removal of the action from the State Court to the Federal Court. The order is

Reversed.

E. L. ANDREWS, ADMINISTRATOR OF J. ANDERSON SMITH, DECEASED, v. B. C. SMITH AND WIFE, ROXIE SMITH, AND THE BANK OF GIBSONVILLE.

(Filed 4 December, 1929.)

1. Evidence D b—Provisions of C. S., 1795 may be waived.

The provisions of C. S., 1795, prohibiting testimony of transactions and communications with a deceased person, by a party in interest, may be waived by the adversary party.

2. Same—Party asking for examination of adverse party waives right to object to evidence so taken as communication with decedent.

Where an administrator brings proceedings under the provisions of C. S., 900, *et seq.*, to examine a defendant to discover assets of the estate of the deceased, the administrator waives the provisions of C. S., 1795, prohibiting testimony of transactions or communications with decedent, and the testimony thus taken may be introduced by the defendant in his own behalf.

CIVIL ACTION, before *Clement, J.*, at June Term, 1929, of GUILFORD.

The plaintiff alleged that J. Anderson Smith died intestate on 8 November, 1927, and that on 28 May, 1927, said intestate had on deposit in the defendant bank the sum of $2,425.04, for which a certificate of deposit had been issued. Plaintiff further alleged that on 30 August, 1927, the defendants, B. C. Smith and Roxie Smith, his wife, obtained

he certificate of deposit and had the funds represented by said certificate ransferred to their own individual account, and that at the time of such ransfer the intestate, J. Anderson Smith, was so weak in body and mind as to be incapable of understanding a business transaction. Plaintiff urther alleged that some time prior to his death the deceased, J. Anderon Smith, had loaned to the defendant, B. C. Smith, the sum of $1,200; hat said defendant, B. C. Smith, had executed and delivered to J. Anderson Smith a note for said sum and secured same by a mortgage on eal estate owned by said defendants, which said mortgage had never been recorded, and that upon the death of J. Anderson Smith the said defendants took possession of all his personal property and wrongfully withheld the same from the plaintiff, administrator.

The defendants, Smith and wife, filed an answer alleging that they had paid the note secured by the mortgage on the land; that J. Anderson Smith, for several years prior to his death, had lived in the home of said defendants, and that said intestate had agreed to pay said defendants for support, and that the transfer of said certificate of deposit was made by the intestate as a payment to the defendants for care and maintenance.

The defendant, Bank of Gibsonville, filed an answer alleging that the ransfer and assignment of said funds was valid and legal.

The evidence tended to show that the defendant, B. C. Smith, was the step-son of the intestate, J. Anderson Smith, and that said step-son, after his marriage, lived in the home of the intestate until the death of he mother of said defendant on 11 July, 1922. After the death of defendant's mother his step-father, J. Anderson Smith, lived in the home of B. C. Smith; that while the intestate was 74 years of age and feeble or some time prior to his death, his mental condition was good until a short time before his death.

It appeared that the defendant, B. C. Smith, had been examined before a commissioner appointed by the clerk at the instance of plaintiff on 9 July, 1928. The affidavit filed by the plaintiff to procure the examination alleged that "J. Anderson Smith died intestate, leaving personal property of value and a considerable sum of money, but at the ime of his death he resided with the defendants and had been residing with them for several years. . . . That the defendants were familiar with his business and knew the whereabouts of his property and where his money was deposited and where his valuable papers were kept, . . . and that there is money and property either in the hands of defendants or in their possession, or the whereabouts of which is well known to hem. . . . That affiant demands the right to examine the defendants before the trial of the above action to the end that he may elicit elevant testimony with reference to the matters and things referred to

herein; . . . that the affiant is informed and believes that the deceased had on deposit in the bank or banks certain moneys belonging to him, and that said defendant, without the authority of deceased, withdrew said funds from said bank or banks, and either has the said funds or has disposed of same without making any account or report to this affiant with respect to the same, but the facts in connection with said matter are peculiarly within the knowledge of the defendants."

Upon the affidavit, an order was duly made to examine said defendant, B. C. Smith, in accordance with C. S., sec. 900 *et seq.* At the trial, the defendant offered in evidence, in his own behalf, his testimony so taken by the plaintiff. This testimony disclosed that the intestate had endorsed the certificate of deposit in controversy and delivered it to the defendant in payment of support, and that the mortgage indebtedness had been paid by the defendant to J. Anderson Smith and the mortgage burned.

Upon issues submitted the jury found that the deceased, J. Anderson Smith, had assigned to the defendants the certificate of deposit; that he had sufficient mental capacity to know and understand the effect of said act, and that the defendants were not indebted to the plaintiff administrator by virtue of the execution of the mortgage referred to in the evidence.

From judgment upon the verdict plaintiff appealed.

F. Eugene Hester and Frazier & Frazier for plaintiff.
Hines, Kelly & Boren and R. M. Robinson for defendants.

BROGDEN, J. The question of law is this: In a suit brought by an administrator of a deceased person, to recover assets of deceased, alleged to be in the custody of defendant, is the testimony of defendant to a transaction with deceased, taken before a commissioner under the provisions of C. S., 901, at the instance of plaintiff, competent, in behalf of defendant upon the trial of the cause, or should the same have been excluded by reason of the inhibition contained in C. S., 1795?

C. S., sections 900 to 908, not only prescribe the method by which an adverse party may be examined, but they also clearly disclose that testimony taken in accordance with the methods prescribed "may be read by either party on the trial." It is contended, however, that testimony taken under C. S., section 900, *et seq.*, is not competent in cases where such testimony would invade the boundary of C. S., 1795. It must be observed, however, that the wise protection established by C. S., 1795, may be waived. *Meroney v. Avery,* 64 N. C., 312; *Norris v. Stewart,* 105 N. C., 455, 10 S. E., 912; therefore, when an administrator examines the defendant upon oath as provided by C. S., section 900, he

does so with full knowledge of the fact that the statute makes such evidence competent at the trial and is thus equivalent to a waiver of the provisions of C. S., 1795. The case of *Phillips v. Land Co.*, 174 N. C., 542, 94 S. E., 12, while not directly in point because of a fact setting different from the case at bar, tends to establish the competency of such evidence, irrespective of the inhibition of C. S., 1795.

We are of the opinion that the evidence was competent.

There was no objection to the issues submitted by the court, and hence the essential merits of the case have been established by the verdict of the jury.

We find no reversible error, and the judgment, as rendered, is approved.

No error.

G. FRANK HONEYCUTT v. L. N. BURLESON AND C. L. SPEARS, EXECUTORS OF R. B. HARTWICK.

(Filed 4 December, 1929.)

1. Evidence D b—C. S., 1795 applies to persons interested in event whether parties or not.

The provisions of C. S., 1795, excluding testimony of transactions and communications with a deceased person by a party in interest, are not confined to the parties to the action, but extend to testimony of a witness interested in the result of the action.

2. Same—Inchoate right of dower is interest in event within purview of C. S., 1795.

The interest which a married woman has in the real property of her husband before and during coverture comes within the intent and meaning of C. S., 1795, and will exclude testimony by her of a communication or transaction between her husband and a deceased person as to a contract made between them whereby a mortgage on the lands of her husband executed prior to his marriage was to be canceled by the deceased.

APPEAL by defendants from *Stack, J.*, at August Term, 1929, of CABARRUS.

On 31 March, 1923, the plaintiff mortgaged a tract of land to R. B. Hartwick, testator of the defendants, to secure $1,900, due 31 March, 1924. The title was encumbered by a prior mortgage in the sum of $2,800. The plaintiff made certain payments on his mortgage, the last on or about 19 January, 1924. He alleges that in the summer of 1925 a contract was made by him and the defendants' testator, by which the testator agreed to remit the remainder due on his mortgage, except the interest due in the fall of 1925, and to cancel the papers if the plaintiff

and his wife would look after, nurse, and care for the testator during his natural life and see that he was not committed to a hospital or to the county home; and that the plaintiff has in all respects performed his part of the contract. The action was brought to restrain a sale of the land under the terms of the mortgage. The material allegations of the complaint were denied and the following verdict was returned:

1. Did the testator, R. Baxter Hartwick, in 1925, contract and agree with the plaintiff, G. Frank Honeycutt, that he would give the plaintiff the balance due by him to the said Hartwick on a note and mortgage for $1,900 if the plaintiff's wife would look after, nurse, and see that said Hartwick was cared for during his life, and never allow him to go to the hospital or to the county home, as alleged in the complaint? Answer: Yes.

2. If so, did the plaintiff perform his part of said agreement? Answer: Yes.

Judgment for plaintiff; appeal by defendants.

Hartsell & Hartsell for plaintiff.
H. S. Williams and Palmer & Blackwelder for defendants.

ADAMS, J. The plaintiff's wife was permitted to testify concerning the execution and the terms of the alleged contract between the plaintiff and the testator of the defendants, who was the mortgagee. An exception of the appellants contests the competency of her testimony on these points.

Upon the trial of an action a party or a person interested in the event shall not be examined as a witness in his own behalf or interest against the executor, administrator, or survivor of a deceased person concerning a personal transaction or communication between the witness and the deceased, except in certain instances which are not material in this case. C. S., 1795. The two immediate questions are whether the plaintiff was interested in the event of the action and whether she testified in her own behalf or interest to a personal transaction with the deceased mortgagee. That she testified to a personal transaction is beyond controversy.

A married woman upon the death of her husband intestate, or she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, tenements, and hereditaments whereof her husband was seized and possessed at any time during coverture, and in like manner to such an estate in all legal rights of redemption, equities of redemption, or other equitable estates in land whereof her husband was seized in fee at any time during the coverture, subject to all valid encumbrances existing before the coverture or made during the coverture with her free consent lawfully appearing. C. S., 4100.

The plaintiff was not married at the time he executed the mortgage to R. B. Hartwick; the mortgagee, therefore, held the legal title to the mortgaged land subject to the right of redemption. *Lewis v. Nunn,* 180 N. C., 159; *Hogan v. Utter,* 175 N. C., 332; *Lumber Co. v. Hudson,* 153 N. C., 96. Upon her marriage his wife became dowable of an equity of redemption in the mortgaged property. If the land had been sold and the purchase price had not exceeded the debt there would have been no proceeds subject to her claim; if there had been an excess the value of her interest would have been much less than if the mortgage had been canceled, for in the latter event she would be dowable of the entire unencumbered tract. The cancellation of the mortgage was a matter in which she had a direct pecuniary interest. Section 1795 applies, not only to a party, but to any person having a pecuniary or legal interest in the event of the action. *Jones v. Emory,* 115 N. C., 158. Upon this principle it was held in *Linebarger v. Linebarger,* 143 N. C., 229, that upon an issue of *devisavit vel non* the wife of a caveator, who was also an heir at law of the testator, was prohibited from testifying to declarations of the testator tending to show undue influence. If her husband had acquired an interest in the land the wife would at once have been entitled to an inchoate right of dower. In *Helsabeck v. Doub,* 167 N. C., 205, the wife's testimony was held to be competent for the reason that if her husband recovered the value of his services to the deceased she would have no right growing out of the marriage relation which would attach to the money recovered. Indeed, the distinction between the two is pointed out in the latter case.

The wife's testimony concerning a personal transaction with the testator should have been excluded, and its admission entitles the defendants to a

New trial.

WILBER ALLEN, BY HIS NEXT FRIEND, M. D. HOLDERBY, v. EDNA COTTON MILL, INC.

(Filed 4 December, 1929.)

Trial C d—Instruction which ignores elements of negligence disclosed by the evidence will be held for reversible error.

An instruction which ignores elements of negligence arising upon the evidence in a personal injury case, as an independent, complete and positive rule of law, is reversible error, and the principle of contextual interpretation, as where a correct instruction has been given on the material elements omitted, is not available to make the instruction complained of harmless error.

ALLEN *v.* COTTON MILL.

CIVIL ACTION, before *MacRae, Special Judge,* at February Term, 1929, of ROCKINGHAM.

The plaintiff, through his next friend, alleged that he was a minor about seventeen years of age, and was employed by the defendant to operate a brake machine in its factory; that said machine is used to manufacture cotton batting. Raw cotton is blown into the machine and passes through rollers at the front of the machine. The evidence tended to show that at times the rollers became stiff or did not operate smoothly, and powder or graphite was put on the rollers by the operator in order to procure a successful operation. There was evidence that oil dripped from oil cups upon the floor where the operator stood, and that powder used to powder the rollers fell on the floor, rendering the floor slick and slippery at the place where the operator was required to stand in the performance of his duties. There was further evidence to the effect that in operating the machine plaintiff slipped upon the powder, oil and grease, and fell into the machine, having his hand caught by the rollers and thereby permanently injured. There was further evidence to the effect that the plaintiff had been instructed as to the proper manner of operating the machine, and at the time of his injury he was operating it in accordance with the instructions given by the agents of the defendant.

The defendant offered strong evidence contradicting the evidence of plaintiff.

Three issues were submitted to the jury:

1. "Was the plaintiff injured by the negligence of the defendant as alleged?"

2. "Did the defendant by his own negligence contribute to his injury as alleged in the answer?"

3. "What damage, if any, is the plaintiff entitled to recover of defendant?"

The jury answered the first issue "No."

From judgment upon the verdict the plaintiff appealed.

P. T. Stiers for plaintiff.
Glidewell, Dunn & Gwynn for defendant.

BROGDEN, J. The elements of negligence involved were the presence of powder and grease upon the floor where the operator of the machine was required to stand in the performance of his duty and in failing to give plaintiff proper instructions for handling the machine.

The judge charged the jury as follows: "The plaintiff contends that he was a minor seventeen years of age at the time of his injury and that the

defendant was negligent in failing to give him proper warning and instructions as to the method and manner of performing his work, and such failure on the part of the defendant was a proximate cause of his injury. If you find from the evidence and by its greater weight, the burden being on the plaintiff, that the defendant failed to exercise ordinary care to give reasonable and proper instructions to the plaintiff, and that such failure was the proximate cause of his injury, you should answer the first issue, Yes; if you do not so find, it would be your duty to answer it, No."

This instruction ignores other elements of negligence disclosed by the evidence offered by the plaintiff. It is true that in other portions of the charge the rule of liability was correctly declared, but the foregoing instruction was the statement of an independent and positive rule of law. In such instances, if the charge complained of was erroneous and prejudicial, this Court has held that the principle of contextual interpretation of the charge does not avail. *Patterson v. Nichols,* 157 N. C., 406, 73 S. E., 202; *Champion v. Daniel,* 170 N. C., 331, 87 S. E., 214; *Construction Co. v. Wright,* 189 N. C., 456, 127 S. E., 580; *Hall v. Rhinehart,* 191 N. C., 685, 132 S. E., 787; *McCall v. Lumber Co.,* 196 N. C., 597, 146 S. E., 579.

There are many other exceptions noted in the record, but as the plaintiff is entitled to a new trial for the error specified, we deem it unnecessary and inadvisable to discuss them.

New trial.

STATE v. E. A. BROWN, R. L. SETZER AND CLEVE SETZER.

(Filed 4 December, 1929.)

Receiving Stolen Goods D a—Verdict of guilty of receiving stolen goods and acquittal of breaking and larceny is not contradictory.

Where the defendant is tried on three separate counts: (1) with feloniously breaking into a railroad car in violation of C. S., 4237, (2) with larceny of certain goods therefrom, (3) with receiving stolen goods with knowledge that they had been stolen, C. S., 4250: *Held,* an acquittal on the first two counts and conviction on the third is not a contradictory verdict as a matter of law, or objectionable on the ground that the doctrine of recent possession applied equally to all counts, there being sufficient evidence to sustain the verdict of guilty on the third count.

APPEAL by defendant, E. A. Brown, from *Oglesby, J.,* at March Term, 1929, of BURKE.

STATE *v.* BROWN.

Criminal prosecution tried upon an indictment charging the defendant, and others, (1) with feloniously breaking into a railroad car in violation of C. S., 4237, (2) with the larceny of certain automobile tires and a number of shotguns, describing them, valued at $100, in the possession of the Southern Railway Company, as bailee, and (3) with receiving said properties, describing them, knowing the same to have been feloniously stolen or taken in violation of C. S., 4250.

Verdict: Guilty on the third count of receiving.

Judgment: Eight months on the roads.

The defendant, E. A. Brown, appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Avery & Patton and C. E. Cowan for defendant.

STACY, C. J. There is evidence on behalf of the State tending to show that on 8 September, 1928, the tires and guns in question were checked into car No. 115311 for shipment over the Southern Railway to Morganton and Swannanoa. The car was sealed and remained sealed until it reached Connelly Springs, where the seal was broken, and the articles found missing. Soon thereafter, the defendants were discovered in possession of the guns and tires in question, with the numbers on the tires obliterated. They offered to sell the tires for less than half their value, and wanted to pawn or sell the guns.

It is the contention of the defendant that he cannot be convicted on the third count in the bill of indictment in the face of an acquittal on the first two counts; that the evidence of recent possession applies alike to all counts; and that as he was not convicted on the first two, he must necessarily be acquitted on the third.

The defendant's logic is better than his law. *S. v. Sisk,* 185 N. C., 696, 116 S. E., 721. Notwithstanding his acquittal on the first two counts, on which the jury may have pardoned him, there was evidence tending to support the third, and we cannot say, as a matter of law, that the verdict is contradictory. *S. v. Record,* 151 N. C., 695, 65 S. E., 1010.

We find no reversible error on the record, hence the verdict and judgment will be upheld.

No error.

M. V. CLEMENT v. CANNON MILLS COMPANY.

(Filed 4 December, 1929.)

Master and Servant C b—Evidence of master's negligence in failing to provide safe tools and place to work held insufficient.

Where there is evidence in a personal injury suit that the plaintiff was ordered to tighten certain nuts on a piece of power-driven machinery operated by pulley belts, and was given a wrench for the purpose, and that the wrench slipped from a nut, throwing the plaintiff's arm against the belt and injuring him: *Held*, in the absence of evidence tending to show a defect either in the wrench or the nut or that the plaintiff had not been furnished a reasonably safe place to work, the doctrine of "simple tools and appliances" applies, and the evidence is insufficient to take the case to the jury, it being required that the plaintiff under the circumstances use due care for his own safety, and a judgment as of nonsuit should have been entered.

APPEAL by defendant from *Finley, J.*, at May Term, 1929, of DAVIE. Reversed.

Action to recover damages for personal injuries sustained by plaintiff while at work as an employee of defendant.

The jury found in response to the issues submitted to them that plaintiff was injured by the negligence of defendant as alleged in the complaint, and that plaintiff did not contribute to his injuries by his own negligence.

From judgment that plaintiff recover of the defendant the sum assessed by the jury as his damages, defendant appealed to the Supreme Court.

Walter E. Brock and B. C. Brock for plaintiff.
A. T. Grant and W. H. Beckerdite for defendant.

CONNOR, J. Plaintiff was ordered by his foreman to tighten the nuts on the loom frames in defendant's mill. He undertook to do this work with a wrench furnished him by his foreman for that purpose. The wrench slipped off one of the nuts. Plaintiff's hand was caught by a belt and was injured. His arm was also injured. He alleges in his complaint that his injuries were caused by the negligence of defendant in failing to furnish him a safe place to work and proper tools with which to do the work required of him.

There was no evidence tending to show that the wrench or the nut from which the wrench slipped was defective, or that the place at which plaintiff was at work was not reasonably safe. Plaintiff testified that the wrench slipped because the nut was not a standard nut. This, however,

was his conclusion from the fact that the wrench slipped from this nut, and had not slipped from the other nuts which he had tightened. He did not see the nuts on the looms. He testified that the wrench fitted the other nuts, but did not fit the nut from which it slipped. This testimony was not sufficient to show that defendant was negligent as alleged in the complaint. The wrench was a simple tool, and the operation of tightening the nuts on the looms was a simple operation. By the exercise of reasonable care, plaintiff could have ascertained before he pulled or pushed the wrench, whether or not it had caught the nut. In the absence of evidence from which the jury could have found that there was some defect in the wrench or in the nut, or that the place at which plaintiff was ordered to work was not reasonably safe, defendant is not liable for damages resulting from his injuries. *Martin v. Manufacturing Co.*, 128 N. C., 264, 38 S. E., 876. There was error in the refusal of defendant's motion, at the close of all the evidence, for judgment as of nonsuit. The judgment is

Reversed.

LEE A. FOLGER v. RUSSELL CLARK, J. MARKS, A. H. SHATFORD, JOSEPH A. MEYERS, JOHN F. CLARK, JR., AND JAMES COKER, PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF JOHN F. CLARK & COMPANY, AND T. H. PARRIS.

(Filed 4 December, 1929.)

Brokers C a—In this case no damage was shown to have resulted from failure to receive stock cum-dividend and plaintiff could not recover.

Where, in an action for damages for failure to receive stock purchased by the plaintiff through the defendant brokers cum-dividend, the evidence tends only to show that the agent of the local brokers represented that the stock bought then would be cum-dividend when in fact it was ex-dividend, and there is no allegation of fraud and the plaintiff had not offered to rescind the contract of purchase: *Held*, in the absence of evidence that the price of the stock purchased had not been reduced by the amount of the dividend, a judgment as of nonsuit should have been allowed, the plaintiff having failed to show any damage arising from the negligence of the local brokers.

APPEAL by defendants from *Stack, J.*, at May Term, 1929, of MECKLENBURG.

Civil action to recover damages of defendants, as brokers, in buying stock for plaintiff on the New York Stock Exchange, ex-dividend, when it had been reported by defendants' agent as selling cum-dividend on the day of purchase.

On 23 February, 1926, the plaintiff placed with the defendants, brokers in the city of Charlotte, an order to buy at the market 500 shares of the common stock of the General Motors Corporation. Defendants' agent represented to plaintiff that orders executed on that day would entitle the purchasers of said stock to a dividend of 1¾%, which had been previously declared, but was not payable until 12 March following. In this, the agent was in error, for said stock sold ex-dividend on that day.

From a verdict and judgment in favor of plaintiff for $875, the amount of the dividend in question, the defendants appeal, assigning errors.

C. H. Gover for plaintiff.
Alfred S. Wyllie and Cansler & Cansler for defendants.

STACY, C. J. The plaintiff has failed to show any loss due to the defendants' negligence. True, he did not get the dividend in question, but there is no evidence that the price of the stock was not thereby reduced. The testimony of defendants' agent would seem to indicate that it was. At any rate, we have discovered no evidence on the record of loss suffered by the plaintiff which may reasonably be said to be proximately attributable to the negligence of the defendants. Plaintiff took the stock and never offered to rescind the contract of purchase. There is no allegation of fraud in the transaction. *McNair v. Finance Co.,* 191 N. C., 710, 133 S. E., 85; *Pritchard v. Dailey,* 168 N. C., 330, 84 S. E., 392.

Of course, a broker is liable in damages for fraud or negligence which results in injury to his customer, but no measurable tort liability has been shown on the present record. 4 R. C. L., 285.

Reversed.

STATE v. W. H. HICKEY.

(Filed 4 December, 1929.)

1. **Constitutional Law J a—Federal provisions as to searches and seizures are not restrictive on states.**

The provisions of the Federal Constitutional Amendment, Art. IV, securing to the people the right of safety and protection of their persons and property against unreasonable searches and seizures, and providing that no warrant should be issued except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized, are not restrictive of the powers of the State, and apply solely to the Federal Government.

2. Intoxicating Liquor A d—Arrest and search of person reasonably suspected of carrying intoxicants is lawful.

Where an officer sees a person leave his automobile with his appearance indicating that he had something concealed on his person and reasonably giving the impression that the person was carrying intoxicating liquor, the officer may immediately arrest and search such person, and where a half-gallon of liquor is found on the person of the defendant the action of the officer does not violate the provisions of Article I, section 11, of the State Constitution.

3. Constitutional Law F a—Provision that defendant may not be compelled to give evidence against self does not apply to physical facts.

Upon the trial of the defendant for violating the prohibition law the introduction in evidence of testimony of the officer making the arrest that he found a half-gallon jar of liquor on the person of the defendant is competent, and is not in violation of the constitutional provision that a defendant may not be compelled to give evidence against himself, the provision not applying to physical facts or conditions.

4. Intoxicating Liquor A b—Turlington Act will be liberally construed.

Our prohibition act was passed in pursuance of Article I, section 2, of the State Constitution providing that all political power is vested in and derived from the people, and the approval of the people of this statute as expressed in the elections requires a liberal construction of the statute to carry out its intention as gathered from its related parts and clearly expressed.

5. Intoxicating Liquor A a—Turlington Act is valid.

An act by our Legislature to make the State law conform to the "Volstead Act" passed by Congress, is valid, and in some respects more stringent than the Congressional act.

6. Intoxicating Liquor A c—"Liquor" will be deemed "intoxicating liquor" in the absence of proof to the contrary.

Where a defendant is indicted for violating our State prohibition law, evidence that he had in his possession one-half gallon of "liquor" is interpreted as being an intoxicating beverage having the prohibited quantity of intoxicant, or containing more than one-half of one per centum of alcohol by volume, when there is no evidence to the contrary.

7. Intoxicating Liquor B a—Evidence of possession of intoxicating liquor is sufficient for directed verdict for possession and transportation.

Where upon the trial of the defendant for the violation of the Conformity Act there is testimony of an officer that he took from defendant, after he left his automobile and was entering a building, a half-gallon jar of liquor, the defendant introducing no evidence: *Held*, the evidence was sufficient to support a charge that if the evidence satisfied the jury beyond a reasonable doubt of the defendant's guilt of possession and transporting, the jury should answer those issues in the affirmative.

APPEAL from *Harwood, J.*, and a jury, at April Term, 1929, of MITCHELL. No error.

A. S. Burleson, an officer, testified to the effect that "I saw him (defendant) get out of the car. He had on a light sweater, and I saw a bulk

of something under his arm, and started to go in the door in the Glenn Building in Spruce Pine, and I ran in before he could get into the door and caught him and took one-half gallon of liquor from under his sweater."

The court below charged the jury: "If this evidence satisfies you beyond a reasonable doubt that the defendant had in his possession liquor, then you would return a verdict of guilty against him for the possession of intoxicating liquor. If this evidence satisfies you beyond a reasonable doubt that the defendant transported liquor—that is, carried it from one place to another and had it in his custody and control, and moved it from one place to another, you would return a verdict of guilty of transporting. The defendant did not introduce evidence in this case. That is not to be considered by you to his prejudice. The burden is on the State to satisfy you beyond a reasonable doubt of his guilt. You may retire and make up your verdict."

There was a verdict of guilty. The court below fined the defendant $100 and costs. The defendant excepted and assigned as error the admission of the testimony of the officer, A. S. Burleson. At the close of the State's evidence, defendant made a motion to dismiss the action or for judgment of nonsuit. C. S., 4643.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Charles Hutchins for defendant.

CLARKSON, J. The defendant cited the following amendments to the Constitution of the United States, claiming that he is protected under them:

Art. IV. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Art. V. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the malitia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

We cannot so hold.

In *S. v. Godette,* 188 N. C., at p. 502, speaking to the subject, it is said: "The United States Court, in *Brown v. New Jersey,* 175 U. S., 175, citing numerous authorities, says: 'The first ten amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on the Federal Government.' *Ensign v. Pennsylvania,* 227 U. S., p. 592; *S. v. Campbell,* 182 N. C., p. 911. This case was taken to the Supreme Court of the United States on writ of error and affirmed. 262 U. S., p. 728; *S. v. Simmons,* 183 N. C., p. 684."

The defendant contends: "The illegal search and seizure of the defendant and the result thereof, the conviction of the defendant, violates said Fifth Amendment to the Constitution of the United States, as well as Article I, section 11 of the Constitution of North Carolina, both of which provide in effect that a defendant shall not be required to give evidence against himself. If the State had been required to proceed against the defendant with such legal evidence as it had, no conviction could have been had. The State did not proceed to convict the defendant by any such evidence, but proceeded to convict him by evidence obtained by the seizure of the person, and a search of his person without a process, and without evidence. The defendant was in effect placed on the stand, examined, and such examination used against him to convict him. The defendant insists that the upholding of these provisions of Federal Constitution and the State Constitution are of far greater importance to the dignity of the law than the conviction of a defendant for a mere misdemeanor."

Article I, sec. 11, of the Constitution of North Carolina, invoked, is as follows: "In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty."

"In North Carolina it has long been the law that a physical fact or condition which was brought out by the illegal action of an officer may be given in evidence against the defendant. *S. v. Graham,* 74 N. C., 646 (prisoner compelled by officer to put shoe in track). This case has been approved in many decisions since, including *S. v. Mallette,* 125 N. C., 725, which case was affirmed in the United States Supreme Court on writ of error in *Mallett v. N. C.,* 181 U. S., 589; *S. v. Thompson,* 161 N. C., 238 and *S. v. Neville,* 175 N. C., 731. There are quite a number of courts that disagree with the principle established by *S. v. Graham, supra.* Some of these decisions are cited by the defendant in his brief. We do not think the action of the officers illegal in the present case." *S. v. Godette, supra,* at p. 503.

We find this in the Constitution of North Carolina, not cited by defendant, Article I, section 2: "That all political power is vested in, and derived from, the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."

The will of the people of North Carolina has been expressed on the very question presented on this appeal. On 27 May, 1908, the matter was submitted to the people of the State. The vote "For the manufacture and sale of intoxicating liquor" was 69,416, "Against the manufacture and sale of intoxicating liquor" was 113,612—total vote 183,028, majority against the manufacture and sale of intoxicating liquor was 44,196.

The Eighteenth Amendment to the Constitution of the United States is as follows: "After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquor within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited." Forty-five States ratified the amendment—North Carolina on 16 January, 1919. The "Volstead Act" was an Act of Congress, 28 October, 1919. An act supplemental to the National prohibition act was approved 23 November, 1921. These acts were passed to carry into effect the Eighteenth Amendment to the Constitution.

The General Assembly of North Carolina, Public Laws of N. C., 1923, ch. 1, C. S., 3411, passed "An act to make the State law conform to the National law in relation to intoxicating liquors," and is to some extent more stringent than the "Volstead Act." This act has been frequently upheld and construed by this Court. *S. v. McAllister,* 187 N. C., 400; *S. v. Beavers,* 188 N. C., 595; *S. v. Knight, ibid.,* 630; *S. v. Jarrett,* 189 N. C., 516; *S. v. Sigmon,* 190 N. C., 684; *S. v. Pierce,* 192 N. C., 766; *S. v. Mull,* 193 N. C., 668; *S. v. Hege,* 194 N. C., 526; *S. v. Dowell,* 195 N. C., 523.

The General Assembly of this State has recently passed an act to teach the children in the schools of the State the danger of intoxicating liquors and narcotics on the human system. Public Laws 1929, chapter 96, "An act to require the public schools of the State to furnish adequate and scientific instruction in the subject of alcoholism and narcotism." This is a wise preventive measure.

In *S. v. Campbell,* 182 N. C., at p. 914-5, the law is stated by *Clark, C. J.,* as follows: "In 3 Cyc., 886, it is said that where 'An offense is committed in the presence or view of an officer, within the meaning of the rule, authorizing an arrest without a warrant, when the officer sees it, although at a distance, or hears the disturbance created thereby and

proceeds at once to the scene thereof, or the offense is continuing, or has not been consummated at the time the arrest is made.' In the case at bar the officers had information, which proved to be correct, that the defendant was carrying on his person, concealed, a quantity of liquor in violation of the provisions of the Consolidated Statutes above quoted. The offense was continuing, and the sale had not been consummated at the time the arrest was made. In many cases, unless an arrest is made under these circumstances, the criminal would escape or the crime be committed before the officer could make affidavit and obtain a warrant. For instance, if the officers had information, which was reliable, that one was carrying a concealed weapon, or was on his way to commit an assault with it, surely it would be their duty to arrest the offender though our statute and our decisions require that in such case they should at once take him before a judicial officer and procure a warrant and institute a judicial investigation." *S. v. Fowler,* 172 N. C., 905; *S. v. Neville,* 175 N. C., 731; *S. v. Simmons,* 183 N. C., 684; *S. v. Jenkins,* 195 N. C., 747.

The witness for the State, officer Burleson, testified "took one-half gallon of liquor off of him."

The defendant, in his brief says: "Is evidence by an officer that he obtained one-half gallon of liquor sufficient to sustain a conviction, without further proof as to the kind, quality and strength of the liquor sufficient to show the same intoxicating?"

The Conformity Act, Public Laws 1923, chapter 1, section 1 (3 C. S., 3411(a), says "(1) The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt or fermented liquors, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one percentum or more of alcohol by volume, which are fit for use for beverage purposes," etc. *S. v. Sigmon, supra,* p. 690.

"Liquor," as the word is commonly used, means intoxicating liquor. *S. v. Gulcznski,* 120 A 88, 89 (Del.); *Shahan v. Hardwick,* 118 S. E., 575, 30 Ga. App., 526; *Clay v. State,* 102 S. E., 367, 24 Ga. App., 811; *Armstrong v. State,* 265, S. W., 672, 673, 150 Tenn., 416.

Generally the word "liquor" implies intoxicating liquor, and therefore proof that a defendant sold "liquor" is sufficient to show, in the absence of adverse testimony, that he sold intoxicating liquor. *Smith v. State,* 86 S. E., 283, 17 Ga. App., 118.

Every contention made by defendant has been frequently decided contrary to the position taken by him on this appeal.

In *S. v. McAllister,* 187 N. C., at p. 404, the following observation is made: "It is well said by *Clark, C. J.,* in the concurring opinion in *S. v.*

Coleman, 178 N. C., 762: 'The intention of the act may be tersely expressed in the phrase, "Taste not, touch not, handle not" the forbidden article (for beverage purposes). It is outlawed by the statute, just as dynamite or any poisonous drug, and for the same reason that the popular will has deemed this necessary for the public welfare, and made the violation of that will a crime.' "

In *S. v. Sigmon,* 190 N. C., at p. 692, we find: "The Legislature of North Carolina, part 3 C. S., 3411(b), has said: 'And all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.' This provision is the wisdom of ages. Solomon, the wisest man (Prov., ch. 23, v. 29, 32), said: 'Who hath woe? who hath sorrow? who hath contentions? who hath babbling? who hath wounds without cause? who hath redness of eyes? They that tarry long at the wine; . . . At the last it biteth like a serpent, and stingeth like an adder.' "

We fully set forth the law on this subject and again "write the vision and make it plain upon tables, that he may run that readeth." Hab. 2:2. We find

No error.

CHARLES B. MacRAE v. CITY OF FAYETTEVILLE AND W. F. CAMPBELL, Building Inspector.

(Filed 4 December, 1929.)

1. Municipal Corporation H b—Ordinance regulating erection of filling stations held invalid under facts of this case.

In proceedings for mandamus to compel a city, through its building inspector, to issue a permit for the erection of a gasoline filling station, an ordinance making it unlawful to erect such a station nearer than 250 feet to any residence within the corporate limits provided that the ordinance shall not apply to such stations already erected, is held void, it appearing that many stations had been erected and that the effect of the enforcement of the ordinance would be to give a monopoly to the stations already erected, and that the ordinance was not uniform in its application, and that to prohibit the building of the station in suit would be to deprive the owner of his property rights.

2. Same—Filling stations are not nuisances per se, and ordinance regulating their erection is void when not uniform and impartial.

Gasoline filling stations built and maintained under the provisions of law are not nuisances *per se,* but are of public necessity, and they may not be prohibited for purely aesthetic reasons, and where an ordinance is not uniform, fair and impartial in its application, it will be held void.

3. Same—Ordinances regulating erection of filling stations which amount to taking private property without compensation are void.

Private property cannot be taken for private purposes, but only for those purposes which are public in their nature upon the payment of just compensation, and an ordinance regulating the erection of gasoline filling stations within the limits of a city that has the effect of confiscating the property of an owner is void.

4. Municipal Corporations H a—Validity of ordinance will not be decided in absence of information as to its reasonableness.

Where subsequent to and pending proceedings in mandamus to compel a city to issue a permit for a filling station under an existing ordinance, the city has passed a general zoning ordinance, the latter will not be considered in the absence of information upon which the courts may determine as to whether the later ordinance was reasonable under the facts presented for determination.

5. Same—Whether ordinance is a valid exercise of the police power is subject to determination by the courts.

An ordinance passed under provision of statute, purporting to fall within the police powers as to health, safety, etc., is subject to judicial review by the courts, and the expressed purpose of the ordinance in this respect is not controlling on the courts.

STACY, C. J., dissents.

APPEAL by defendants from *Sinclair, J.*, at Chambers, 13 July, 1929, Fayetteville, N. C. From CUMBERLAND. Affirmed.

This is an application for a writ of mandamus, under C. S., 866, against the city of Fayetteville and its building inspector, to issue a permit to plaintiff authorizing him to construct a filling station upon a certain lot of plaintiff's in the city of Fayetteville, at the intersection of Hay Street and Hinsdale Avenue, being a lot 153 feet on Hay Street and 100 feet on Hinsdale Avenue. The summons was issued 22 June, 1929, and duly served on defendants and complaint and amended complaint duly filed setting forth certain ordinances which plaintiff prayed to be declared void, and that defendant building inspector grant permit. The material part of answers of defendants is to the effect that the ordinances are valid under the police power given the city of Fayetteville, and that the action be dismissed.

The judgment rendered by the court below is as follows: "This cause coming on to be heard before his Honor, N. A. Sinclair, Judge, at Chambers, and being heard upon the verified complaint, and answers, and upon affidavits filed by plaintiff and defendants, and upon argument of counsel, and the court being of the opinion that the ordinances set out in the complaint and the amended complaint are invalid: It is therefore, upon motion of Rose & Lyon and James MacRae, attorneys for plaintiff, considered and adjudged that the building inspector of the

city of Fayetteville be, and he is hereby ordered and directed to issue a permit to the plaintiff for the construction of a filling station, upon the land described in the complaint, subject to the conformance by the plaintiff with the building laws of the State of North Carolina. Done at Fayetteville, N. C., this 13 July, 1929."

The defendants excepted to the judgment as signed and assigned error and appealed to the Supreme Court. The other necessary facts will be set forth in the opinion.

Rose & Lyon for plaintiff.
Robinson, Downing & Downing for defendants.

Clarkson, J. The question for our determination is the validity of the following ordinance:

"Section 1. That it shall be unlawful for any person, firm or corporation to install, build, construct or erect, alter or repair any building, place or structure to be used as what is commonly known as a gasoline service station where gasoline and oils are kept and sold, nearer to any dwelling than 250 feet, within the corporate limits of the city of Fayetteville, provided that this ordinance shall not apply to service stations already established, and to the erection of any stations where a permit has already been issued by the city.

Section 2. Any person, firm or corporation violating the provisions of this ordinance shall, upon conviction before the mayor, be fined $25.

Section 3. That this ordinance shall be in force and effect from and after its ratification." This ordinance was adopted 24 June, 1929.

The ordinance which was first sought by plaintiff to be declared invalid, defendants in their brief say "To be perfectly frank with this Court, we do not contend for the validity of the ordinance." We do not consider that ordinance.

After this application for the writ of mandamus was instituted, the defendant, city of Fayetteville, passed the above ordinance mentioned on 24 June, 1929. The facts undisputed on the record are to the effect that the lot upon which it is sought to erect a gasoline station is on Hay Street, one of the longest in the city, and a portion runs through the business section and a large portion runs through the residential section, and the lot is near the center of the oldest residential section, and that the nearest filling station to the lot is more than 1,700 feet. The affidavit of James MacRae, made 13 July, 1929, was to the effect that the property has an encumbrance on it of approximately $15,000, and a heavy and substantial payment will be due in August, 1929. That diligent efforts have been made to rent the property for residential purposes, but the efforts have been in vain; that the property has been vacant for approximately twelve months and no revenue has been derived there-

from; that unless the contract for sale be consummated with the Standard Oil Company, that it is highly probable that plaintiff will be unable to discharge encumbrances against the same, resulting in the loss of the property. It was also in evidence that property in that vicinity was growing less valuable and desirable for residential purposes, as the tendency of business was to travel westwardly, and the property was becoming more valuable and desirable for business purposes. It was in evidence that the Standard Oil Company will erect upon the premises a thoroughly modern and up-to-date filling station constructed from the best material, equipped with every safety device, under a general scheme, plan and type of architecture in keeping with the cleanliness and beauty of that portion of the city of Fayetteville in which the property is located and that the cost of said building and improvements will be between eight and ten thousand dollars. In the event a permit is granted the same would be so constructed as to comply with the building laws of the State of North Carolina, and the regulations of the city of Fayetteville.

There was evidence to the effect that the erection of the filling station would constitute "a hazard and eye sore," and would materially affect the desirability of the entire vicinity for residential purposes.

It was in evidence that a survey of the filling stations now operating in the city of Fayetteville has been made, and that as a result thereof it appears that there are twenty-four of such stations within the corporate limits of said city, and that twenty-three of them are located within 250 feet of residences used and occupied as such. That the total number of such filling stations operated within the corporate limits of the city of Fayetteville, only one is serviced by the Standard Oil Company, the others being serviced by its competitors. Building a filling station on plaintiff's lot would be within 250 feet of a dwelling or residence.

Automobiles are here to stay, and are now generally used for business and pleasure, and it is necessary for the convenience of the public that filling stations and garages be established and even in residential sections of cities and towns they are held not to be nuisances *per se*. *Hanes v. Carolina Cadillac Co.*, 176 N. C., p. 351; *Bizzell v. Goldsboro*, 192 N. C., 348; *Clinton v. Oil Co.*, 193 N. C., 432.

In every civilized country it is well-settled, with rare exceptions, that private property cannot be taken for private purposes and private property can only be taken for public purposes upon the payment of just compensation. A gasoline station is not, under the law, *per se* "a hazard." It might be to some an "eye-sore," but the law does not allow aesthetic taste to control private property, under the guise of police power. Speaking to the subject, we find in *City of Sturgeon v. Wabash Ry. Co.*, 17 S. W. Rep., 2 ser. (Mo.), at p. 618, the following: "The city

has no power to declare that to be a nuisance which is not so at common law or by statute." *Allison v. City of Richmond,* 51 Mo. App., 133; *Carpenter v. Reliance Realty Co.,* 103 Mo. App., 480, 77 S. W., 1004; *St. Louis v. Heitzeberg Packing & Provision Co.,* 141 Mo., 375, 42 S. W., 954, 39 L. R. A., 551, 64 Am. St. Rep., 516; *Crossman v. Galveston,* 112 Tex., 303, 247 S. W., 810, 26 A. L. R., 1210. Even where the general power exists to declare a nuisance, a city cannot declare the place of a single individual to be a nuisance in the absence of a general regulation applicable to all others of the same class. 19 R. C. L., sec. 117. Neither can a city by virtue of the police power alone, for purely aesthetic purposes, limit the use which a person may make of his property. 19 R. C. L., 140.

Ordinances of towns and cities where private property is involved must be uniform, fair and impartial in their operation. The present record discloses that there are now twenty-three filling stations within 250 feet of residences—the ordinance limit. As to these residences, we do not know whether they belong to the rich or the poor, but they are near filling stations perhaps for all time. The ordinance upon consideration prohibits the building of a filling station on plaintiff's lot within 250 feet from residences, which would prohibit plaintiff erecting a filling station on his lot. Is this ordinance in its operation uniform, fair and impartial? The statement of the facts is a sufficient answer that it is not. Then, again, 250 feet from any residence in the cities and towns where lots are generally 50 to 100 feet frontage, would practically limit in the future gasoline stations to small area and tend to allow a monopoly of those already in existence. The vice of the ordinance is apparent. We have no doubt of the good intentions of the governing body of defendant, city of Fayetteville, but the operation of such an ordinance, under the facts disclosed in this action, is destructive of property rights. The facts of record disclose that to keep plaintiff from selling his property, heavily encumbered, vacant for over twelve months, unable to rent for residential purposes, paying no doubt heavy taxes on vacant property, the ordinance was enacted. The ordinance reaches out to practically confiscate plaintiff's property and places a 250 feet limit, which gives a monopoly to twenty-three gasoline stations near homes and excludes plaintiff. The facts in reference to the reasonableness of ordinances of this kind are subjects of inquiry by the courts to determine the validity. *Board of Health v. Lewis,* 196 N. C., 641; *Standard Oil Co. et al. v. Marysville Adv.,* op. 445, Sup. Ct. Rep., Vol. 49, p. 430. We cannot hold the ordinance valid. *Bizzell v. Goldsboro,* 192 N. C., 348; *Clinton v. Oil Co.,* 193 N. C., 432; *Burden v. Town of Ahoskie, post,* 92.

In *Hardin v. City of Raleigh,* 192 N. C., 395, even in zoning ordinances, it is held that there must be uniformity and a tribunal is estab-

lished and charged with duties and the matter subject to review. On 12 August, 1929, a zoning ordinance was adopted by the city and defendants request this Court to now allow it to be set up as a defense, citing *Refining Co. v. McKernan,* 179 N. C., 314. In that case the action was pending, and 1 October, 1919, the ordinance was passed and the application for mandamus was heard at October Term, 1919, of the court after the ordinance was passed. The Court was able on the record to determine the reasonableness of the ordinance. In the present action judgment was rendered in favor of plaintiff and after appeal to this Court the zoning ordinance was adopted. We are not inclined to allow the ordinance to be pleaded. There is no way to consider the reasonableness of the zoning ordinance.

"A determination by the Legislature to what is a proper exercise of the police power is not final and conclusive, however, but is subject to the supervision of the courts. For, as has already been stated, the mere assertion by the Legislature that a statute relates to the public health, safety and welfare, does not of itself bring such statute within the police power of the State. It is clear that legislative bodies, under the guise of police regulations protecting the public welfare, cannot arbitrarily pass laws which have no relation to that subject. Whether the police power has been exercised within the proper limitations, whether or not a law is reasonable, whether a particular measure is designed to further some governmental function or to further private gain, and whether an act bears any reasonable relation to the public purpose sought to be accomplished, are all judicial questions. In like manner the question as to what are subjects of the lawful exercise of the police power is a question for judicial determination. Therefore, in its last analysis, the question of the validity of measures enacted under the police power is one for the court." 6 R. C. L., at p. 241-2. The judgment of the court below is

Affirmed.

STACY, C. J., dissents.

S. O. PEEBLES AND WIFE, JEANETTE PEEBLES, v. W. C. IDOL, TRUSTEE, AND THE PIEDMONT BUILDING AND LOAN ASSOCIATION.

(Filed 4 December, 1929.)

1. Evidence D c; I b—Where bank ledger has no probative value as evidence tending to establish fact in issue it is properly excluded.

In proceedings to enjoin a sale under foreclosure of a deed of trust where the plaintiff introduces evidence tending to show that he had not received the loan for which the deed of trust was given, the ledger of the

bank, identified as a record of the lender, with the bank showing two items for the same amount of the loan charged against the lender on the day that the borrower deposited a like amount with the bank: *Held*, the ledger sheet was properly excluded in the absence of evidence from which the jury could find that one of the items charged to account of the lender was paid to the borrower, it having no probative force upon the fact of payment in issue, and being irrelevant and immaterial.

2. Trial E g—In the charge to the jury the use of the word "testimony" instead of "evidence" held not prejudicial error in this case.

Held, in this case that the use by the judge in his charge to the jury of the word "testimony," instead of the word "evidence," upon the quantity of proof required of the plaintiff, was not prejudicial to the defendant.

APPEAL by defendants from *Clement, J.*, at June Term, 1929, of GUILFORD. No error.

Action to enjoin the sale of land under the power of sale contained in a mortgage from plaintiffs to the defendant, W. C. Idol, trustee, and for the cancellation of said mortgage, and of the note secured thereby, payable to the defendant, the Piedmont Building and Loan Association.

The allegation in the complaint that plaintiffs have received no consideration for said note was denied in the answer. The issue thereby raised was submitted to the jury and answered as follows:

"Was the note secured by a mortgage, which mortgage is recorded in Book 444, page 300, in the office of the register of deeds of Guilford County, executed without consideration, as alleged in the complaint? Answer: Yes."

From judgment on the verdict, defendants appealed to the Supreme Court.

King, Sapp & King for plaintiffs.
Roberson, Haworth & Reese for defendants.

CONNOR, J. Some time prior to 13 October, 1924, the plaintiff, S. O. Peebles, the owner of a certificate for ten shares of its stock, issued to him on 15 January, 1924, applied to the defendant, the Piedmont Building and Loan Association of High Point, N. C., for a loan of $1,000, to be secured by said certificate, and by a mortgage on certain land described in said application. The application for the loan was approved by the directors of said association. Thereupon, on 13 October, 1924, plaintiffs executed a mortgage by which they conveyed to the defendant, W. C. Idol, trustee, the land described in the application. A note for $1,000, executed by the plaintiff, S. O. Peebles, and payable to the defendant association, the mortgage securing said note, executed and acknowledged by the plaintiffs, and the certificate for ten shares of its stock, owned by the plaintiff, S. O. Peebles, were delivered to the de-

fendant association and are now in its possession. Default has been made in the payment of said note, according to its tenor, and at the request of the defendant association, the defendant, W. C. Idol, trustee, has advertised the land conveyed to him by the mortgage for sale.

Plaintiffs allege in the complaint in this action that they have received no consideration for the note secured by the mortgage; they pray judgment that the defendants be enjoined from selling the land described in the mortgage, under the power of sale contained therein, and that the note and mortgage be canceled and delivered to them.

Defendants deny the allegation in the complaint that plaintiffs have received no consideration for said note; they allege that a check for $1,000, payable to S. O. Peebles, and drawn by W. C. Idol, secretary of the Piedmont Building and Loan Association, on the Wachovia Bank and Trust Company, was delivered to the plaintiff, S. O. Peebles, on or about 17 November, 1924, for said note, and that said check was deposited by the said S. O. Peebles with the Wachovia Bank and Trust Company of High Point, N. C., to his credit, on 19 November, 1924, and that on said day the said check was charged to the account of the Piedmont Building and Loan Association with said Bank and Trust Company.

Evidence for the plaintiffs tended to show that within a few days after the note, mortgage and certificate were delivered by him to the defendant association, and before its attorneys had reported to it the result of their investigation as to plaintiffs' title to the land described in the mortgage, the plaintiff, S. O. Peebles, notified W. C. Idol, secretary of the defendant association, that he would not need the loan for which he had applied, and that he had requested the said W. C. Idol to return his papers to him, and that the said W. C. Idol advised the said plaintiff that the said papers would be returned to him by mail, as soon as they were received from the attorneys of the association. The report of the attorneys was received by the association on 28 October, 1924. Neither the note, the mortgage nor the certificate was returned to plaintiffs. S. O. Peebles testified that when he subsequently called on W. C. Idol, secretary of defendant association, and again requested him to return his papers to him, the said W. C. Idol, after failing to find the papers in his office, insisted that they had been returned to plaintiff by mail. Under the rules governing the defendant association, interest on loans to its stockholders was payable monthly, with the monthly payments on the shares of stock owned by them. No demand was made on plaintiff, S. O. Peebles, for interest on his note until some time in October, 1927, when defendant association demanded of the said S. O. Peebles payment of interest for thirty-four months, contending that he was in arrears on

these payments. Plaintiff denied that he owed the defendant association any sum on account of said note, and demanded the return of the note and mortgage to him.

Evidence for the defendants tended to show that on 17 November, 1924, the defendant, W. C. Idol, as secretary of the defendant association, drew a check for $1,000, payable to S. O. Peebles, on the Wachovia Bank and Trust Company, for the loan which said association had agreed to make to the plaintiff. The note, mortgage and stock certificate were then in the possession of the defendant association, having been received from its attorneys, with their approval of plaintiffs' title to the land described in the mortgage, on 28 October, 1924. The mortgage which had been duly acknowledged by plaintiffs on 13 October, 1924, was recorded in the office of the register of deeds of Guilford County, on 29 October, 1924. W. C. Idol testified that he had no recollection that plaintiff had notified him that he did not want the loan, and had requested him to return the papers to him, as soon as they were received from the attorneys of the association. He testified that as secretary of the defendant association, on 17 November, 1924, he drew a check for $1,000, payable to S. O. Peebles, and that he filled in the blanks on the stub of his check book, showing date, the amount and the payee of the check. He did not testify that he delivered the check to S. O. Peebles, in person or otherwise. Neither the check nor the stub was offered in evidence. Witnesses for defendants testified that the checks of the defendant association and the stubs for the month of November, 1924, had been destroyed. Defendants accounted for the failure to demand of the plaintiff the monthly payments of the interest on the note, in accordance with its terms, by evidence tending to show that the bookkeeper in the employment of the defendant association failed to make the proper entries on the records of the association, and did not discover his error until after the lapse of thirty-four months.

In order to show that plaintiff, S. O. Peebles, received and collected the check for $1,000, which defendants' evidence tended to show was drawn by W. C. Idol, as secretary of defendant association, payable to him, defendants offered in evidence, without objection from plaintiffs, the account of S. O. Peebles with the Wachovia Bank and Trust Company. This account showed that on 19 November, 1924, S. O. Peebles deposited to his credit with said Bank and Trust Company the sum of $1,000. There was no evidence tending to identify this deposit with the check for $1,000, drawn by W. C. Idol, secretary of the Piedmont Building and Loan Association, bearing date 17 November, 1924. There was evidence tending to show that from November, 1924, to September, 1925, S. O. Peebles, who was actively engaged in business during said period made 340 deposits with the Wachovia Bank and Trust Company

at High Point, N. C., aggregating the sum of $142,951.50. Three of these deposits were for $1,000 each, to wit, on 19 November, 1924, 14 April, 1925, and 24 September, 1925. Plaintiff testified that he was unable, at the date of the trial in June, 1929, to identify the source of any of these deposits. W. C. Idol, who is the cashier of the Wachovia Bank and Trust Company at High Point, and also secretary of the Piedmont Building and Loan Association, testified that he had, upon investigation, ascertained that one of the deposits for $1,000, shown on the account of S. O. Peebles, was a loan made to him by the said Bank and Trust Company, and that the other deposit was a loan made to him by the defendant association, subsequent to the date of the note in controversy. The witness was unable to identify the deposit of 19 November, 1924, with the check which he had testified that he drew as secretary of the defendant association, payable to S. O. Peebles on 17 November, 1924.

Defendants further offered in evidence the account of the Piedmont Building and Loan Association with the Wachovia Bank and Trust Company, for the month of November, 1924, as shown on a ledger sheet identified as a record of said Bank and Trust Company made in the due course of its business. Plaintiffs objected to the introduction of this ledger sheet which showed that on 19 November, 1924, the Piedmont Building and Loan Association was charged with three items, two of $1,000 each, and one of $700. There was no evidence tending to show to whom these sums were paid, or tending to show that either of the items for $1,000 had any relation to the deposit of $1,000 on the same day to the credit of S. O. Peebles. Plaintiffs' objection to the introduction of the ledger sheet showing the account of the Piedmont Building and Loan Association with the Wachovia Bank and Trust Company was sustained. On their appeal to this Court, defendants rely chiefly upon their assignment of error based upon this exception.

In the absence of evidence from which the jury could find that one of the items of $1,000, shown on the ledger sheet, as charged to the account of the defendant association, on 19 November, 1924, was paid to the plaintiff, S. O. Peebles, on the check drawn by W. C. Idol, secretary of said association, on 17 November, 1924, payable to him, the said ledger sheet was properly excluded as evidence upon the issue submitted to the jury in this case. It has been held that the books of a bank when they are proved to have come from the proper depository, are admissible in evidence. 10 R. C. L., p. 1175, sec. 373. However, they are not admissible, when they are not competent, for the reason that they have no probative value as evidence tending to establish a fact involved in the issue to be determined by the jury. In the instant case, the fact that the account of the defendant association with the Wachovia Bank and

Trust Company was charged on 19 November, 1924, with two items of $1,000 each, does not tend to show that the deposit on the same day with said Bank and Trust Company of $1,000, to the credit of S. O. Peebles, was made from the proceeds of either of said items. The fact which the excluded evidence tends to show is not relevant to the facts sought to be proved, to wit: that S. O. Peebles deposited the check of the defendant association with the said Bank and Trust Company, on 19 November, 1924, and that said check was paid by the said Bank and Trust Company to him on said day. Evidence, although admissible, should be excluded when it is irrelevant, and therefore incompetent. In *Martin v. Knight,* 147 N. C., 564, 61 S. E., 447, it is said, on page 582: "It is clear that a paper-writing or record containing no information upon which an inference could be drawn in regard to the matter in controversy, is irrelevant and inadmissible for any purpose." The entry on the ledger sheet which was excluded by the court showed only that two items, each for $1,000, were charged to the defendant association by the Wachovia Bank and Trust Company, on 19 November, 1924; there was no evidence from which the jury could find that there was any relation between either of the items charged on the account of defendant association and the deposit credited on the account of S. O. Peebles; or that there was any relation between either the charge or the credit, and the check, which was drawn by W. C. Idol, as secretary of the defendant association, on 17 November, 1924, payable to S. O. Peebles. There was no error in the exclusion of the ledger sheet as evidence in this case.

Other assignments of error on this appeal based upon exceptions to the rulings of the court upon matters of evidence cannot be sustained. The use of the word "testimony," by the judge in his charge to the jury, instead of the word "evidence" in the instruction as the quantity of proof required of plaintiffs, was manifestly not prejudicial to the defendants. The judgment is affirmed. We find

No error.

STATE v. RAEFORD BURLESON, RADFORD DENNIS AND JIM JOLLY.

(Filed 4 December, 1929.)

1. Criminal Law G d—Testimony of telephone conversation held competent under the facts of this case.

Where a defendant in a criminal action depends upon proving an alibi by showing by his witness that at the time the offense was committed that he was at her house in a different place, and, in contradiction of the testimony of such witness, an officer arresting the defendant testifies that on the night of the arrest he called up the telephone number of the residence

of this witness and that a female voice answered and said that she was in the residence called for, but was not the person asked for, but that she would call her sister, who was such person, and then another female voice answered, identified herself, and said the defendant had not been in her house: *Held*, sufficient evidence that the witness herself had answered the phone and was competent as evidence tending to contradict her testimony to the contrary.

2. Evidence D d—Where identity of other person is established testimony as to phone conversation is competent.

Testimony of a witness that he had had a conversation with another person over the telephone is admissible, if otherwise competent, where the identity of the other person is established by evidence.

3. Criminal Law L e—In this case held there was no error in respect to rulings on admission of evidence.

Exceptions in a criminal action to the rulings of the court with respect to the admission of evidence as to an alibi relied on will not be held for error when all defendant's evidence tending to establish the alibi was submitted to the jury.

4. Burglary C d—In this case held: evidence of breaking and entering otherwise than burglariously was sufficient to overrule nonsuit.

In this case *held:* evidence of defendant's guilt of unlawfully and feloniously breaking and entering a barber shop and repair shop, with intent to steal, and with the larceny of certain articles of personal property, was sufficient to be submitted to the jury, and defendant's motion as of nonsuit was properly overruled. C. S., 4643.

APPEAL by defendants from *Clement, J.,* at July Term, 1929, of STANLY. No error.

The defendants were tried upon six several indictments pending in the Superior Court of Stanly County. These indictments were consolidated for the trial of the issues raised by pleas of not guilty by each of the defendants to said indictments.

Each defendant was charged with unlawfully and feloniously breaking and entering the barber shop of Arlie Morris in Stanly County, on the night of 10 August, 1928, with intent to steal, take and carry away certain articles of personal property therein; and, also, with the larceny of said articles of personal property, of the goods and chattels of the said Arlie Morris, with a count in the indictment for receiving said stolen property, knowing the same to have been stolen.

Each defendant was also charged with unlawfully and feloniously breaking and entering the general repair shop of T. J. Austin, in Stanly County, on the night of 10 August, 1928, with intent to steal, take and carry away certain articles of personal property therein; and, also, with the larceny of said articles of personal property, of the goods and chattels of the said T. J. Austin, with a count in the indictment for receiving said stolen property, knowing the same to have been stolen.

There was a verdict of guilty as to each defendant as charged in each indictment.

From the judgment on each of said verdicts, defendants appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

G. Hobart Morton, J. R. Burleson, O. J. Sikes and R. L. Brown for defendants.

CONNOR, J. All the evidence offered at the trial in the Superior Court tended to show that the crimes charged in the indictments, upon which the defendants were tried, were committed, as alleged in said indictments. There was a conflict in the evidence as to whether the defendants are the persons who committed said crimes. The evidence was submitted to the jury under a charge by the court to which there was no exception. On their appeal to this Court defendants contend that there was error in the refusal of the court to allow their motion, made at the close of all the evidence under C. S., 4643, that the actions be dismissed, and in the rulings of the court upon their objections to certain evidence offered by the State.

There was ample evidence tending to show that defendants are the persons who broke and entered the barber shop of Arlie Morris, between eleven-thirty and twelve o'clock, on the night of 10 August, 1928, and took and carried away certain articles of personal property, then in said barber shop, and owned by the said Arlie Morris. There was evidence tending to show that the persons who broke and entered the general repair shop of T. J. Austin, are the same persons who broke and entered the barber shop. The repair shop is located at a short distance from the barber shop. It was entered on the same night, and a short time after the barber shop was entered. The persons who entered both shops rode away in a Chevrolet coupe, which was identified by witnesses as the same coupe as that in which the defendants were riding that night, both before and after the commission of the crimes. If the defendants are the persons who broke and entered the barber shop and took and carried away the property of Arlie Morris, as the evidence for the State tended to show, there was also evidence sufficient to show that the defendants are the persons who broke and entered the repair shop and took and carried away the property of T. J. Austin. There was no error in the refusal of the court to allow the motion that the actions be dismissed.

Evidence offered by defendants tended to show that they left Albemarle, on the night of 10 August, 1928, at about ten-thirty o'clock, in a Chevrolet coupe, driven by the defendant, Radford Dennis; that they

drove said coupe to Salisbury, arriving there at about eleven o'clock; that they went to the home of Miss Minnie Loyd Scales in Salisbury, and that the defendant, Raeford Burleson, remained there, while the other defendants drove about the city; that these defendants, after about an hour, returned to the home of Miss Scales; that the defendant, Raeford Burleson, left said home with the other defendants, at about twelve-twenty o'clock; that some time thereafter they returned to Albemarle. The defendants were in Albemarle at two-thirty o'clock, when they were arrested, upon the charge that they had broken and entered the barber shop of Arlie Morris, and the repair shop of T. J. Austin, in Albemarle, at some time between eleven-thirty and twelve o'clock that night.

Miss Minnie Loyd Scales, as a witness for the defendants, testified that she lives in Salisbury; that on the night of 10 August, 1928, the defendants came to her home in Salisbury, arriving there at about eleven-fifteen o'clock; that the defendant, Raeford Burleson, remained there for about an hour; that the other defendants left him there, and in about an hour returned for him; that all three defendants left her home at about twelve-twenty o'clock, and that the defendants were riding in a Chevrolet coupe.

She testified that after defendants left her home, she went to bed; that her sister, Elizabeth Scales, returned home that night from Charlotte, after she had gone to bed. Her sister did not call her to the telephone, and she had no conversation that night with any one at Albemarle.

Miss Elizabeth Scales, as a witness for the defendants, testified that she returned to her home in Salisbury from Charlotte, about one-thirty o'clock on the night of 10 August, 1928; that she did not know that defendants had been at her home that night; that she answered a telephone call from Albemarle after she came home and told the person who had called that the defendants had not been at her home that night. She testified that she did not call her sister, Minnie Loyd Scales, who was at the time in bed, to the telephone, and that her sister did not talk over the telephone to the person who had called from Albemarle, and asked about the defendants.

Raeford Burleson, one of the defendants, testified that after the defendants were arrested in Albemarle on the night of 10 August, 1928, he told the officers who had arrested them that the defendants were in Salisbury at the time it was alleged that the barber shop and the repair shop in Albemarle had been entered; that he told officer Burleson to call Miss Minnie Loyd Scales on the telephone, at 784-W in Salisbury, and that she would corroborate his statement.

After these witnesses had testified, the State offered the testimony of officer Burleson to contradict the testimony of Miss Minnie Loyd Scales

and Miss Elizabeth Scales, with respect to the telephone conversation. Officer Burleson testified that when he called 784-W, Salisbury, a girl came to the telephone and said that she was Elizabeth Scales; that he told her that he wanted to speak to Miss Minnie Loyd Scales, and that the girl told him to hold the telephone, and that she would call Minnie Loyd Scales; that in a few minutes another girl came to the telephone and said that she was Minnie Loyd Scales; that he told her that he was an officer at Albemarle and wished to know whether or not she had seen Raeford Burleson, Radford Dennis and Jim Jolly at her home that night, and that this girl told him over the telephone, in response to his inquiry, that she had not seen them.

In apt time the defendants objected to this testimony on the ground that the witness had not identified the girl who he testified had talked with him over the telephone as Miss Minnie Loyd Scales. The objection was overruled, and the defendants excepted. The assignment of error based on this exception cannot be sustained.

There was evidence from which the jury could find that the girl who talked with the officer over the telephone was Minnie Loyd Scales. It is admitted that the officer talked with some girl who was in Salisbury at number 784-W; that Minnie Loyd Scales was in the house in which the telephone bearing this number was located, and that Elizabeth Scales, who was also in the house, talked with the officer. All the evidence shows that the officer had a telephone conversation with a person who was talking to him, at Salisbury, through the telephone in the home of Minnie Loyd Scales, and that the officer wished to speak to her and not to Elizabeth Scales. The testimony of a witness that he had a conversation with another person over the telephone, is admissible where the identity of the other person is established by evidence. The conversation, if otherwise competent, should not be excluded as evidence, because it was had over the telephone, when the identity of the person talking to the witness is established. In the absence of evidence tending to identify the person with whom the witness had the telephone conversation, evidence as to the conversation should be excluded.

It has been generally held that a person talking at one end of the telephone line may be identified by his or her voice. *Manufacturing Co. v. Bray,* 193 N. C., 350, 137 S. E., 151. It is said that "by the weight of authority evidence is admissible as to conversations over the telephone, when the witness has called for a designated person at his place of business, and the one answering the telephone, and carrying on the conversation claims to be the person called for." See note L. R. A., 1918D, p. 720. Whether this rule, founded upon modern business practice, shall be adopted in this jurisdiction or not, we do not now decide. In the instant case, while there was no evidence tending to show that

the officer recognized the voice of the person who talked with him over the telephone, there was evidence tending to show that such person was Miss Minnie Loyd Scales. The conversation which the officer testified that he had on the night of 10 August, 1928, with the person who claimed to be Minnie Loyd Scales, was competent as evidence tending to contradict both Miss Minnie Loyd and Miss Elizabeth Scales.

We have considered other assignments of error, all of which are based upon exceptions to the rulings of the court with respect to the admission of evidence. These assignments of error cannot be sustained. All of defendants' evidence tending to show that they were in Salisbury and not in Albemarle, when the crimes with which they are charged were committed in Albemarle, was submitted to the jury. In the absence of error in decisions of the trial court as to matters of law or legal inference, the verdict of the jury cannot be disturbed by this Court. The judgments must be affirmed. We find

No error.

GRIFFITH PROFITT COMPANY, A PARTNERSHIP COMPOSED OF W. O. GRIFFITH, FRED PROFFITT, WM. I. PARNELL, AND TRADING UNDER THE FIRM NAME OF GRIFFITH PROFFITT COMPANY, v. S. L. ENGLISH.

(Filed 4 December, 1929.)

1. Quasi-Contracts A a—In this case held: plaintiff's remedy was upon implied contract.

Where a clerk in a store without authority from his employer, sells certain of his employer's goods for a debt personally owed by him to the purchaser or his agent, and the employer refuses to ratify the transaction and seeks to hold the purchaser liable for the purchase price: *Held*, there was no "meeting of the minds" between the purchaser and the employer, and the employer's right to recover is on an implied contract for their reasonable worth, *quantum meruit*, on the day he got the goods.

2. Limitation of Actions E c—Where there is conflicting evidence as to time goods were gotten under implied contract the question is for jury.

Where in an action on an implied contract for the reasonable worth of articles received, the three-year statute of limitations will bar recovery, and where the statute is pleaded and there is conflicting evidence as to the time the articles were gotten by the defendant, the question as to whether the claim is barred by the statute is a question for the jury, and a directed verdict thereon will be held for reversible error.

APPEAL by defendant from *MacRae, J.*, at August Term, 1929, of YANCEY. New trial.

GRIFFITH *v.* ENGLISH.

This was a civil action for the recovery of an account of $110, the price of a wagon. The action was commenced by the issuance of a summons by S. T. Bennett, justice of the peace, on 31 May, 1928, and served on defendant 9 June, 1928. An appeal was taken from the justice of the peace to the Superior Court. The defendant, S. L. English, set up the defense that the account was barred by the statute of limitations. Defendant also denied that he contracted the debt sued on, and alleged that one Roy Horton, to whom the plaintiff's clerk, Arcemus Higgins, was indebted, made the debt with the clerk, who was the agent of the plaintiff, and that it was the debt of Roy Horton, and not of this defendant; that he got the wagon from plaintiff's store under the following circumstances: Roy Horton was building a house for Arcemus Higgins, who was clerking in plaintiff's store; that Roy Horton owed defendant for some framing that went into Arcemus Higgins' house. Defendant wanted to purchase a wagon from plaintiff, and Horton told him that he could make arrangements with Higgins to get the wagon on what Higgins owed him, Horton, and he went to the store and got the wagon under these circumstances.

Horton testified: "I am the one that was building the house for Arcemus Higgins. I bought the framing to go into this house from Mr. English. Mr. English wanted some money to buy a wagon with, and I didn't have it, and he told me he was going to get it over here at Griffith Proffitt's place, and I told him I could make arrangements for him to get it from Cem (Arcemus Higgins), and give Cem credit for the amount of the wagon on the amount he was due me for building his house and let it go on this material. So he saw me again and told me he went in and spoke to Cem about getting the wagon, and he told him it would be all right if I would come in and make arrangements about it with him. So, I went into the store, and he was busy with a customer, and I just passed by him and said, 'You know what you were talking about to Louis English about that wagon; it is all right with me for you to go ahead and let him have it.' He said, 'All right,' that he would. I come back out the door and told Mr. English he could get the wagon. I remember the young man, Walter Barnes, who I was holding the team for. I spoke to Cem Higgins about this wagon again a day or two after this. I told him it was all right for him to let Mr. English have the wagon that way; that he could take credit for it on what he was due me, and that Mr. English would give me credit for it. When I told him that he said it was all right."

Plaintiffs contended that their clerk, Arcemus Higgins, had no authority to sell the wagon and pay a debt which he owed to Roy Horton on account of his building contract with him, and that the delivery of

the wagon to defendant under the circumstances was without authority, and plaintiffs have never ratified the clerk's conduct in the matter.

The first time plaintiffs gave defendant a statement of his account, with the wagon on it, for $110, was on 2 August, 1925. Defendant sent plaintiffs check for $18.70, amount of bill other than the wagon, on 17 November, 1925. Plaintiff kept the check until 13 August, 1926, and defendant paid it off with cash.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Is the account sued on barred by the statute of limitations? Answer: No.

2. What amount, if any, is the plaintiffs entitled to recover of the defendant? Answer: $110 and interest."

The other necessary facts and assignments of error will be set forth in the opinion.

R. W. Wilson for plaintiffs.
Watson & Fouts for defendant.

PER CURIAM. The record discloses that the statute of limitations was plead by the defendant. The charge of the court below was as follows: "Gentlemen of the jury, there are two issues in this case for you to answer: The first is: Is the amount set out barred by the statute of limitations? The court charges you that if you believe all the evidence you will answer that issue No. The second issue is: What amount, if anything, is the plaintiff entitled to recover of the defendant? The court charges you that if you believe all the evidence you will answer that issue $110 and interest." The defendant excepted and assigned error.

The testimony of S. L. English was, in part: "Mr. Proffitt says I got the wagon the 3d of June (1925), but it was the 19th day of May (1925). I know I got it the 19th of May, for my record here on my book shows it, and Roy Horton credited on the 19th of May for $110. I got the wagon before I finished putting the lumber down. I finished on the 23d of May. I hauled part of the lumber with the new wagon. Walter Barnes went into the store with me when I went in to see Higgins about letting me have the wagon."

The action was commenced on 31 May, 1928. The defendant, English, testified that he got the wagon on 19 May, 1925. According to his testimony the account for the wagon, $110, would be barred by the statute of limitations, as the suit was brought after three years. C. S., 441. There was no "meeting of the minds" between plaintiffs and defendant, hence no express contract. The plaintiffs did not authorize and refused to ratify the transaction between their clerk, Arcemus Higgins, Roy

Horton and defendant, therefore defendant having gotten plaintiff's wagon and kept it and used it, there was an implied contract for money had and received, and he owed what it was reasonably worth, *quantum meruit,* on the day he got it. Defendant is liable from the day of his enrichment—getting the wagon—from his testimony 19 May, 1925. *Cole v. Wagner,* 197 N. C., 692.

This is a matter for the jury, the probative force was for them. For the reasons given, there must be a

New trial.

A. B. DRAFTS v. JAMES SUMMEY AND HIS WIFE, CAROLINE SUMMEY.

(Filed 4 December, 1929.)

Justices of the Peace E a—Where appeal from justice's court has not been docketed according to C. S., 660, dismissal is proper.

Where an appeal from the justice of the peace has been dismissed in the Superior Court for failure to docket the appeal therein as required by C. S., 660, the judgment of the Superior Court will be sustained by the Supreme Court on further appeal thereto. As to whether the magistrate's judgment is void on its face is not presented or decided on this appeal.

APPEAL by defendants from *Finley, J.,* at April Term, 1929, of HENDERSON. Affirmed.

This action for the summary ejectment of defendants from land described in the affidavit filed by plaintiff, was begun in a court of a justice of the peace of Henderson County on 15 December, 1928.

Plaintiff alleged that defendants went into possession of said land as his tenants at will, and that their term had expired. Defendants denied the tenancy. They alleged that the court was without jurisdiction of the action, for that the title to the land was involved therein. The court found, as appears from its judgment, that this allegation is not bona fide, and that plaintiff is entitled to the possession of the land.

From judgment for the plaintiff rendered on 22 December, 1928, defendants gave notice of their appeal to the Superior Court of Henderson County. They failed to docket said appeal at the next term of said court, which convened on 14 January, 1929. Upon the docketing of the appeal at the term of said court which began on 29 January, 1929, plaintiff moved that same be dismissed. This motion was allowed.

From judgment dismissing the appeal, defendants appealed to the Supreme Court.

Ewbanks, Whitmire & Weeks for plaintiff.

Geo. M. Pritchard, McKinley Pritchard and Reynolds G. Florance for defendants.

PER CURIAM. The judgment dismissing defendants' appeal from the judgment of the court of the justice of the peace to the Superior Court of Henderson County is affirmed. C. S., 660. *Barnes v. Saleeby,* 177 N. C., 256, 98 S. E., 708. Defendants having failed to docket their appeal as required by statute, plaintiff's motion to dismiss said appeal was properly allowed. Whether or not the judgment of the justice of the peace in favor of plaintiff and against the defendants, is void on its face, is not presented or decided on this appeal. We decide only that there was no error in the judgment dismissing the appeal from the justice of the peace. The judgment is

Affirmed.

STATE v. WILLIE ROBERSON.

(Filed 11 December, 1929.)

1. Municipal Corporations H c—Zoning ordinance cannot be collaterally attacked in prosecution for violation.

Where the building inspector of a city, under authority of a zoning ordinance, refuses to issue a permit for the erection of a building to be used for a store and filling station, and the owner appeals to the board of adjustment, which affirms the decision of the building inspector, the remedy of the owner to test the validity of the ordinance is by proceedings in the nature of a *certiorari* to have the question decided by the Superior Court, with right of appeal to the Supreme Court, and he may not erect a building without a permit and in violation of the ordinance and collaterally attack the validity of the ordinance in a prosecution against him for its violation, and evidence relating to the reasonableness of the ordinance is properly excluded in the prosecution for its violation. 3 C. S., 2776 (r) *et seq.*

2. Same—Decision of Board of Adjustment is not subject to collateral attack.

The board of adjustment of a city having power to hear and decide appeals from any order or decision of an administrative official charged with the enforcement of any zoning ordinance passed under the provisions of 3 C. S., 2776 (r) is a *quasi*-judicial body, and its decisions are subject to review by the Superior Courts by proceedings in the nature of *certiorari,* 3 C. S., 2776 (x), and a decision of the board is not subject to collateral attack.

STATE *v.* ROBERSON.

APPEAL by the defendant from *Sinclair, J.*, at March Criminal Term, 1929, of DURHAM. No error.

S. C. Chambers for City of Durham.
Victor S. Bryant for defendant.

ADAMS, J. Certain zoning ordinances were enacted by the city council of the city of Durham and became effective on 18 May, 1926. Under these ordinances certain residence zones, business zones, and industrial zones were designated and set apart for the purposes therein set forth. The following is a part of section 1: "No building or premises shall be erected, altered or used for any other purpose than a purpose permitted in the zone in which such building shall be erected, except in conformity with the regulations herein prescribed for the zone in which such building is located." Section 2 permits in the residence zones the erection of certain buildings therein described and in effect prohibits the erection therein of buildings of any other class. The building erected by the defendant is not one of those permitted by this section. Section 5 of the Building Code, which went into effect 1 November, 1925, provides that the erection, construction or alteration of any building, structure or part thereof shall not be commenced until a written permit is issued, and that the work shall strictly conform to the application and plans; also that the inspector of buildings shall have power to revoke any permit in case of a false statement or misrepresentation of any material fact relating to the erection, alteration or removal of a building. Section 10 is as follows: "Upon completion of any new building, structure or alteration to any building or structure, provided no violation of this code exist, the inspector of buildings shall issue to the owner a certificate of occupancy of the building or part thereof, showing that the provisions of this code have been complied with, and no building can be occupied until such certificate has been issued."

The defendant erected a store and automobile service station near the eastern corporate limits of the city in one of the B residence zones. Before doing so he applied to the building inspector for a permit, which was refused. He then appealed from the building inspector's decision to the board of adjustment, and the board sustained the inspector's ruling and denied the defendant's application. The defendant thereafter completed and operated his store and filling station without having a permit. A warrant was issued from the recorder's court charging the defendant with a breach of the zoning ordinances and the building code. The defendant assailed the ordinance on the ground that it is unreasonable and unconstitutional. He offered to show that within the radius of a quarter of a mile from his premises there is only one store and no filling

station; that with the exception of another building there is neither a store nor a filling station within a radius of a half-mile; and that there are only three other business places within three-quarters of a mile from his property. This evidence was excluded, and the jury were instructed to return a verdict of guilty if they found the facts to be as shown by all the evidence. The question is whether there is error in this instruction.

The exclusion of the evidence must be approved for the reason that the defendant by failing to pursue his statutory remedy is precluded from attacking the ordinance collaterally upon the ground which he assigns.

Zoning ordinances are of comparatively recent origin. Only a few years ago it would generally have been conceded that the courts would not sustain an ordinance excluding all business buildings from a residence district, but in more recent decisions the zoning power of municipal corporations is recognized and upheld. Such ordinances are usually enacted in pursuance of legislative power conferred upon cities and towns on the theory of promoting the public health, the public safety and the public welfare, when they are reasonable and free from discrimination. *Berger v. Smith,* 160 N. C., 205; *S. c.,* 156 N. C., 323; *Small v. Edenton,* 146 N. C., 527; Annotation, 19 A. L. R., 1395; *State ex rel. Civello v. New Orleans,* 33 A. L. R., 260; *Biller v. Board of Public Works,* 38 A. L. R., 1479; Annotation, 43 A. L. R., 668; *Gorieb v. Fox,* 274 U. S., 603, 71 Law Ed., 1228; *Nectow v. Cambridge,* 277 U. S., 183, 72 Law Ed., 842.

Our statute law with respect to zoning regulations is embraced in C. S., 2776(r) *et seq.* Section 2776(x) provides for the appointment of a board of adjustment, who shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to the act. It further provides that every decision of the board shall be subject to review by proceedings in the nature of *certiorari.* The statute thus confers upon the board the right to exercise the functions and powers of a *quasi*-judicial body. This is the Court's conclusion as stated in *Harden v. Raleigh,* 192 N. C., 395, and in *Little v. Raleigh,* 195 N. C., 793.

When in the case before us the building inspector's decision was affirmed by the board of adjustment the defendant should have sought a remedy by proceedings in the nature of *certiorari* for the purpose of having the validity of the ordinances finally determined in the Superior Court, and if necessary by appeal to the Supreme Court. This he failed to do and left effective the adjudication of the board of adjustment. The board's judgment is not subject to collateral attack. As was said in *S. v. Kirkpatrick,* 179 N. C., 747, 750, "He (the defendant) has taken

the law in his own hands and adjudged that the ordinance is invalid, or that for some reason, which is not stated, he is exempt from its authority." Of similar import is the decision in *Manufacturing Co. v. Commissioners of Pender,* 196 N. C., 744.

No error.

WILLIAM TINKER v. RICE MOTORS, INC.

(Filed 11 December, 1929.)

1. Appeal and Error J c—Findings of fact supported by evidence are not subject to review.

Upon a motion to set aside a purported service of process and to dismiss the action, the findings of fact of the trial court in relation thereto, supported by the evidence, are not subject to review on appeal.

2. Process B d—Local bookkeeper of foreign corporation is not agent on whom valid service of corporation can be made.

The local bookkeeper of a nonresident corporation, whose sole duty is to collect the defendant's account here, who is not an officer or director of the corporation, and who is without managing or supervisory authority and not clothed with discretion by his principal, is not an agent of the corporation on whom valid service of process on the corporation can be made.

APPEAL by plaintiff from *Johnson, Special Judge.* From BUNCOMBE. Affirmed.

Pegram & Thornton and James E. Rector for plaintiff.
Lee, Ford & Coxe for defendant.

ADAMS, J. This is a motion to set aside the purported service of process and to dismiss the action. The motion was allowed upon the following facts, which were found by the trial judge.

The plaintiff was indebted to the defendant on certain notes; also on agreements for the conditional sale of personal property. In January, 1929, J. E. Pierce, upon whom process in the present action was served, came to Buncombe County and made an effort to collect the amount due by the plaintiff to the defendant. Failing to make the collection he caused warrants to be issued charging the plaintiff with the felonious trading in Tennessee of property he did not own and with feloniously removing from Tennessee personal property the title to which had been retained, in violation of the laws of that State, and with being a fugitive from justice. After his arrest under these warrants the plaintiff sued

out a writ of *habeas corpus* and was released from custody. He then brought an action against the defendant for false imprisonment, abuse of process, and malicious prosecution, and caused process to be served on J. E. Pierce, who was the bookkeeper of the nonresident defendant, but not an officer or a stockholder or a general agent of the defendant or clothed with authority generally to make collections for the defendant. Pierce's sole authority in North Carolina and his sole business here were to collect the defendant's claim against the plaintiff and to take such legal action as was necessary to achieve this purpose. He was a witness neither in the trial before the justice of the peace nor upon the return of the writ of *habeas corpus*. The findings are not subject to review in this Court. *Higgs v. Sperry,* 139 N. C., 299.

Upon these facts it was adjudged that Pierce was not an agent upon whom process could be served in an action against the defendant, and that the action be dismissed.

It will be observed that the question is not whether the defendant, while in North Carolina, was immune from the service of process in an action against him personally, but whether service upon him subjected the defendant to the jurisdiction of the court in which the plaintiff instituted his action.

The first paragraph of C. S., 483, is as follows: "If the action is against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof. Any person receiving or collecting money in this State for a corporation of this or any other State or government is a local agent for the purpose of this section. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides, in this State, or when it can be made personally within the State upon the president, treasurer or secretary thereof."

Pierce, as the trial court found, was not a general and superintending agent of the defendant; he was therefore not a managing agent. *Cunningham v. Express Co.,* 67 N. C., 425. He did not have exclusive supervision and control of any department of the defendant's business, the management of which required the exercise of independent judgment and discretion. 21 R. C. L., 1353; *Furniture Co. v. Furniture Co.,* 180 N. C., 531. It is equally obvious that he was not a local agent. "The term local pertains to place, and a local agent to receive and collect money, *ex vi termini,* means an agent residing either permanently or temporarily for the purpose of his agency, and was not intended to embrace a mere transient agent. The mischief chiefly intended to be provided against, no doubt, was to give a remedy in our courts against corporations chartered in other States who make contracts in this State

and appoint special agents or attorneys in fact to make collections." *Moore v. Bank,* 92 N. C., 590. The scope of the word "agent" is given in *Whitehurst v. Kerr,* 153 N. C., 76: "While there is some apparent conflict of decision in construing these statutes providing for service of process on corporations arising chiefly from the difference in the terms used in the various statutes on the subject, the cases will be found in general agreement on the position that in defining the term agent it is not the descriptive name employed, but the nature of the business and the extent of the authority given and exercised which is determinative, and the word does not properly extend to a subordinate employee without discretion, but must be one regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him." In accord with this are the preceding cases of *Kelly v. LeFaiver,* 144 N. C., 5, and *Higgs v. Sperry, supra.* The case of *R. R. v. Cobb,* 190 N. C., 375, may easily be distinguished. In view of the foregoing decisions the plaintiff's assignments of error must be resolved in favor of the appellee. The judgment is

Affirmed.

LACY E. ROBBINS v. AMERICAN UPHOLSTERY COMPANY, INC.

(Filed 11 December, 1929.)

1. Master and Servant C b—Evidence of master's negligence held sufficient to be submitted to the jury.

Where there is evidence tending to show that the plaintiff was ordered by the general manager of the defendant to operate a power-driven circular saw, in which work the employee was inexperienced, and that there were no guards to the saw and that it imperfectly revolved or wobbled when running, and that obstruction on the floor prevented the employee from standing in front of the saw while operating it, and that he was not warned of the danger: *Held,* the evidence of the employer's negligence in failing to furnish the employee reasonably safe and suitable tools and appliances and a reasonably safe place to work, and in failing to warn and instruct the employee, was sufficient to be submitted to the jury and overrule defendant's motion as of nonsuit.

2. Master and Servant C f, C g—Contributory negligence and assumption of risk are ordinarily questions for the jury.

Contributory negligence of the servant and assumption of risk by him are ordinarily questions for the determination of the jury, and in this case *held:* defendant's motion as of nonsuit should have been overruled.

APPEAL by plaintiff from *MacRae, Special Judge,* at April Special Term, 1929, of DAVIDSON. Reversed.

The plaintiff alleged that while in the service of the defendant he was ordered by the defendant's general manager to leave the work he was doing and operate a rip-saw for the purpose of ripping or sawing boards; that his right hand was drawn into the saw; that one finger was severed from the hand and the others were badly injured; and that this injury was proximately caused by the defendant's negligent failure to provide for the plaintiff suitable tools and appliances and a safe place in which to work, and its negligent failure properly to instruct him as to the danger to which he was exposed. The defendant denied the plaintiff's material allegations and pleaded contributory negligence. At the conclusion of the plaintiff's evidence the action was dismissed as in case of nonsuit and the plaintiff excepted and appealed.

Spruill & Olive for plaintiff.
Phillips & Bower and McCrary & DeLapp for defendant.

ADAMS, J. The evidence construed most favorably for the plaintiff tends to show that he was employed, not to run the saw, but to crate furniture; that he was inexperienced in the use of the saw and was injured in a few minutes after beginning his work; that the defendant's general manager ordered him to rip the boards and Reedy Leonard "to tail the saw"; that the machinery was run by a motor; that the saw was not properly set; that it had no guard; that the teeth were dull and uneven; that it "wabbled and did not run true"; and that the plaintiff could not stand in front of the saw on account of obstructions on the floor.

The plaintiff testified he knew the work was dangerous because the saw had no guard, and that he worked there because he was ordered to do so, and he "was trying to do his duty."

It does not appear from the record whether the nonsuit was based upon a want of sufficient evidence to prove the defendant's negligence or upon contributory negligence established by the plaintiff's testimony. There is some evidence of negligence on the part of the defendant which should be submitted to the jury; and the testimony in regard to contributory negligence is not such as to show that the probability of danger in the use of the saw was so obvious that we should conclude as a matter of law that a person of reasonable prudence would not under the circumstances have continued in the work. Both questions involve matters for determination by the jury. The judgment is

Reversed.

FARMERS FEDERATION, INC., v. W. S. LOCKMAN, JR.

(Filed 11 December, 1929.)

1. Attachment A b—Attachment will lie against property of nonresident defendant in action on contract.

In an action to recover a judgment for breach of contract attachment against the defendant's property situated in this State may be issued when it is made to appear that the defendant is a nonresident of this State.

2. Same—In this case held: finding that defendant was nonresident was supported by the evidence.

Where the complaint and affidavit in attachment in an action allege that the defendant is a nonresident of this State, which the defendant does not deny either in his answer or affidavit, it is sufficient to support a finding of fact by the trial court that the defendant was a nonresident of this State, and the fact that the defendant owned a home here in which he and his family spent a part of their time is not inconsistent therewith. C. S., 798, 799.

APPEAL by defendant from *Schenck, J.*, at August Special Term, 1929, of HENDERSON. Affirmed.

Ray, Redden & Redden for plaintiff.
Joseph W. Little for defendant.

ADAMS, J. The plaintiff brought suit to recover a judgment for $490.09, and on 24 July, 1929, caused a warrant of attachment to be levied on personal property owned by the defendant. On 29 August, 1929, the defendant filed an affidavit and made a motion to vacate the warrant of attachment. The motion was denied first by the clerk and afterwards, on the defendant's appeal, by Judge Schenck, who found the following facts:

1. The defendant is a nonresident of the State of North Carolina, it being admitted that the defendant is a resident of the State of Florida, and was at the time of the issuing of the summons and warrant of attachment in this cause, and is now, a resident of the State of Florida.

2. The defendant is the owner of both real and personal property located in Henderson County, some personal property of the defendant being attached in this cause, but no real estate is attached.

3. At the time of the issuing of the summons in this cause and the warrant of attachment the defendant was occupying his house upon his property in Henderson County, as well as since the 10th day of July, 1929, and that summons and warrant of attachment were personally served upon the defendant while so occupying his house on said property,

on 24 July, 1929, and that said defendant is now occupying his house on said property with his family.

4. Defendant has filed answer in this cause, entering a special appearance as to the warrant of attachment.

A warrant of attachment against the property of a defendant may be granted when the action is instituted to recover a judgment for breach of contract and the defendant is a nonresident of the State. C. S., 798, 799. The defendant excepted to the finding that he is a nonresident of North Carolina on the ground that it is not supported by the evidence. We think the finding is supported by the evidence. The warrant recites as appearing by the plaintiff's affidavit that the defendant is a nonresident of the State of North Carolina, and in the complaint it is alleged that the defendant is a resident of the State of Florida and the city of West Palm Beach. These allegations are not denied either in the answer or in the affidavit of the defendant. The statement that he owns a farm in Henderson County and lives there a part of the time is not inconsistent with the fact that he is not a resident of the State. The judge finds upon sufficient evidence that the defendant is a nonresident of this State and that it is admitted that he is a resident of the State of Florida. Authority need not be cited to sustain the proposition that this finding is conclusive. Judgment

Affirmed.

JAMES LINK v. CAROLINA & NORTHWESTERN RAILWAY COMPANY.

(Filed 11 December, 1929.)

Master and Servant E d—Action under Federal Employers' Liability Act must be brought within two years regardless of infancy.

The Federal Employer's Liability Act, providing that no action should be brought thereunder unless commenced within two years from the day from which the cause of action accrued, does not permit an extension of time specified by reason of infancy or other disability, and an action not brought within the time prescribed will be dismissed.

APPEAL by plaintiff from *Sink, Special Judge,* at June Special Term, 1929, of MECKLENBURG.

Civil action to recover damages for an alleged negligent injury.

Plaintiff alleges that the defendant is a common carrier by railroad, engaged in interstate commerce; that on 4 March, 1926, he was a minor 19 years of age, employed by the defendant in such commerce, and that on said date he was injured through the negligence of defendant's servants or agents.

This action was commenced 18 September, 1928, more than two years after the date of the injury.

From a judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

Ural R. Murphy and Stewart, MacRae & Bobbitt for plaintiff.
John A. Marion and John M. Robinson for defendant.

STACY, C. J. The action was properly dismissed on authority of *Murray v. R. R.*, 196 N. C., 695, 146 S. E., 801, and *Belch v. R. R.*, 176 N. C., 22, 96 S. E., 640.

The Federal Employers' Liability Act (45 U. S. C. A., sec. 56) provides: "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

There is no provision in this statute extending or tolling the time for filing suit by reason of infancy or other disability. *Gillette v. Del. L. & W. Ry.*, 102 Atl. (N. J.), 673 (minority of plaintiff); *Bement v. Grand Rapids Ry. Co.*, 160 N. W. (Mich.), 424 (fraudulent representations of defendant's agent which caused plaintiff to delay); *Alvarado v. So. Pac. Ry. Co.*, 193 S. W. (Tex.), 1108 (insanity resulting from the injury).

Indeed, it has been held with us that a provision in a contract of insurance, limiting the time for instituting suit to recover under the policy, is not affected by the minority of the plaintiff. *Beard v. Sovereign Lodge*, 184 N. C., 154, 113 S. E., 661; *Heilig v. Ins. Co.*, 152 N. C., 358, 67 S. E., 927.

Affirmed.

STATE v. WILLIAM J. GLENN.

(Filed 11 December, 1929.)

1. Homicide E a—Under the facts of this case instruction on defendant's duty to retreat held erroneous.

Upon evidence tending to show that the defendant was in a room 12 x 14 feet at the back of a store with only one door as an entrance, through which the deceased came and angrily said to the defendant that he was tired of him, and added while reaching for his pistol, "Damn you, I will kill you," resulting in a struggle in which the deceased was shot and killed: *Held*, reversible error for the judge to charge the jury that if the assault on the defendant was not felonious the defendant would be required to retreat before he would be justified in taking the life of the other, there being no avenue open to the defendant.

2. Same—General law of self-defense.

One may kill in defense of himself or his family when he believes it to be necessary to prevent death or great bodily harm, and has a reasonable ground for the belief under the facts and circumstances as they appear to him, the jury to determine the reasonableness of the belief upon which he acts.

3. Same—Right to use force to repel assault.

In the exercise of the right of self-defense more force must not be used than is reasonably necessary under the circumstances, and if excessive force is used the party charged is guilty of manslaughter at least, but the law does not require juries to measure with exactness and nicety the amount of force used if one is really acting in self-defense.

APPEAL by defendant from *Harwood, Special Judge,* at April Term, 1929, of MITCHELL.

Criminal prosecution tried upon an indictment charging the defendant with the murder of one T. C. Robinson.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's prison for a term of not less than three nor more than five years.

The defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

McBee & Berry, S. J. Black and Watson & Fouts for defendant.

STACY, C. J. When the case was called for trial, the solicitor announced that the State would not insist upon a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree or manslaughter as the evidence might disclose. Whereupon counsel for the prisoner stated that the defendant would admit the killing with a deadly weapon, but no more, and assume the burden of mitigation or self-defense.

The evidence discloses that on 8 November, 1928, the defendant, William J. Glenn, slew the deceased, T. C. Robinson, with a deadly weapon, to wit, a pistol. It appears that the defendant, and two others, were in a small room in the back of a store about 12 by 14 feet, which had but a single door or entrance; that the deceased came into the room and closed the door behind him, thus placing himself between the defendant and the only means of exit; that the deceased asked the defendant what he had said to his wife, as he came through the store, to which the defendant answered, "Not a thing, Till." In reply, the deceased remarked in an angry tone: "Well, I am damn tired of you Glenns," and further added, while reaching for his pistol, which was in a holster under his left arm:

"Damn you, I will kill you." Whereupon the defendant whipped out his pistol and began firing. The two men clinched, and it was soon discovered that the deceased was mortally wounded.

The following excerpt, taken from the charge, forms the basis of one of defendant's exceptive assignments of error:

"If the deceased was making a felonious assault upon the defendant at the time he fired, the defendant would not be required to retreat, but if you should find that he was making an ordinary assault upon him, even though you should find that it was an assault with a deadly weapon, but not a felonious assault as I have defined to you, then the defendant would not be permitted to stand his ground and take the life of the deceased, but would be required to retreat."

The vice of this instruction lies in the fact that it required the defendant to retreat, even though the deceased was assaulting him with a deadly weapon, when there was no avenue of retreat open to the defendant. *S. v. Dills,* 196 N. C., 457, 146 S. E., 1. The instruction is misleading when applied to the facts of the present case. *S. v. Lee,* 193 N. C., 321, 136 S. E., 877; *S. v. Waldroop,* 193 N. C., 12, 135 S. E., 165. The defendant's back was already to the wall, and the law does not require one to retreat in the face of an assault, felonious or other, when there is no way of escape open to him. *S. v. Bost,* 192 N. C., 1, 133 S. E., 176.

With respect to the right of self-defense, the decisions are to the effect:

1. That one may kill in defense of himself or his family, when necessary to prevent death or great bodily harm. *S. v. Gray,* 162 N. C., 608, 77 S. E., 833.

2. That one may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. *S. v. Barrett,* 132 N. C., 1005, 43 S. E., 832.

3. That the reasonableness of this belief or apprehension must be judged by the facts and circumstances as they appeared to the party charged at the time of the killing. *S. v. Blackwell,* 162 N. C., 672, 78 S. E., 316.

4. That the jury and not the party charged, is to determine the reasonableness of the belief or apprehension upon which he acted. *S. v. Nash,* 88 N. C., 618.

There is a distinction made by the text-writers on criminal law, which seems to be reasonable and supported by authority, between assaults with felonious intent and assaults without such intent. "In the latter, the person assaulted may not stand his ground and kill his adversary if there is any way of escape open to him, though he is allowed to repel force by force and give blow for blow. In the former class, where the

attack is made with murderous intent, the person attacked is under no obligation to fly, but may stand his ground and kill his adversary, if need be." 2 Bishop's Criminal Law, sec. 6333, and cases cited. It is said in 1 East Pleas of the Crown, 271: "A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors by violence to commit a felony, such as murder, rape, burglary, robbery, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing it is called justifiable self-defense." The American doctrine is to the same effect. See *S. v. Hough,* 138 N. C., 665, 50 S. E., 709, and *S. v. Dixon,* 75 N. C., 275.

In the exercise of the right of self-defense, more force must not be used than is reasonably necessary under the circumstances, and if excessive force or unnecessary violence be used, the party charged will be guilty of manslaughter, at least *(S. v. Robinson,* 188 N. C., 784, 125 S. E., 617), but the law does not require juries to measure with exactness and nicety the amount of force used, if one is really acting in self-defense. *S. v. Pugh,* 101 N. C., 737, 7 S. E., 757.

There are other exceptions appearing on the record, worthy of consideration, but as they may not arise on another hearing, we shall not consider them now.

For the error, as indicated, a new trial must be awarded, and it is so ordered.

New trial.

STATE v. RAY EVANS.

(Filed 11 December, 1929.)

1. Homicide B a—In this case held: evidence of premeditation and deliberation sufficient for verdict of murder in first degree.

The premeditation and deliberation preceding the killing of another necessary to constitute murder in the first degree does not depend upon the length of time between the formation of intent to kill and the execution of that intent, and where the evidence tends to show that the prisoner was violating the prohibition law, had armed himself with a concealed weapon, and, when apprehended by an officer, tried to hide his liquor and get away, and when notified of the purpose of his arrest, whipped out his pistol with his right hand, which had been under his overalls for quite a while, and shot and killed the officer: *Held,* the evidence of premeditation and deliberation was sufficient to warrant a verdict of murder in the first degree. C. S., 4200.

2. Same—If fixed design to kill is formed and subsequently executed there is sufficient premeditation and deliberation.

If the prisoner kills simultaneously with the formation of the intent to kill there is no premeditation, but if he weighs the purpose to kill long enough to form a fixed design which he executes at a subsequent time, however soon or remote, there is sufficient premeditation and deliberation, and in determining the question of premeditation and deliberation it is proper for the jury to consider the conduct of the prisoner before and after, as well as at the time of, the homicide.

3. Same—Flight is not evidence of premeditation.

Flight is not evidence of premeditation and deliberation.

APPEAL by defendant from *Clement, J.*, at July Term, 1929, of RICHMOND.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of one W. D. Smith.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The prisoner appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. R. Jones and J. C. Sedberry for defendant.

STACY, C. J. There is evidence on behalf of the State tending to show that on the afternoon of 12 June, 1929, the prisoner, Ray Evans, a colored man, shot and killed W. D. Smith, a township constable of Richmond County, while the latter was attempting to arrest the former or to prevent his forcible escape from custody. The officer had a warrant for one Lander Ingram, and, in looking for him, stopped at the home of Lula Belle Mitchell to inquire as to where Ingram lived. While obtaining this information, the deceased saw the defendant run out of the back door of Lula Belle Mitchell's house with some fruit jars of liquor which he dropped in a dewberry patch not far away. The officer and his son picked up the liquor and came back to the front of the house, where the deceased met the prisoner, caught him by his left arm, and said: "You are under arrest." The prisoner inquired, "What for?" The deceased replied: "For liquor." Whereupon the prisoner said: "I am not going," and he jerked loose from the officer, drew a pistol from his overalls with his right hand, which had been in his pocket all the while, and shot the deceased three times, one of which proved fatal. The prisoner later told the sheriff, while in jail, that the reason he shot three times, or more than once, was because the deceased did not turn him loose. The officer never drew his pistol; he had a jar of liquor in one

hand and was holding the prisoner with the other. The prisoner had been to South Carolina earlier in the day and returned with a gallon and a quart of liquor, which he carried to the home of Lula Belle Mitchell. The shooting took place about first dark. The defendant ran away, but was apprehended in Roanoke, Va., and returned to Richmond County jail, ten or twelve days after the homicide.

The prisoner testified that he thought the deceased was reaching for his pistol at the time he shot, but the jury did not accept this version of the matter. It is the contention of the defendant, however, that, in no view of the case, can he be guilty of more than murder in the second degree, and, in support of this position, he relies upon *S. v. Rhyne,* 124 N. C., 847, 33 S. E., 128, and cases there cited. The crucial point, therefore, is whether the evidence tending to show premeditation and deliberation is sufficient to warrant a verdict of murder in the first degree. We think it is. *S. v. Miller,* 197 N. C., 445; *S. v. Steele,* 190 N. C., 506, 130 S. E., 308; *S. v. Merrick,* 172 N. C., 870, 90 S. E., 257; *S. v. Cameron,* 166 N. C., 379, 81 S. E., 748; *S. v. McClure,* 166 N. C., 321, 81 S. E., 458; *S. v. Daniels,* 164 N. C., 464, 79 S. E., 953; *S. v. Exum,* 138 N. C., 599, 50 S. E., 283; *S. v. Thomas,* 118 N. C., 1113, 24 S. E., 431; *S. v. Norwood,* 115 N. C., 789, 20 S. E., 712.

The prisoner was violating the prohibition laws; he had armed himself with a concealed weapon; he tried to hide his liquor and to get away from the officer; he was notified of the purpose of his arrest; he whipped out his pistol with his right hand, which had been under his overalls for quite a while, and shot the deceased three times without cause. The jury found that the homicide was the culmination of a preconceived plan or design, executed deliberately and with malice. The evidence warrants the finding, and this is murder in the first degree. C. S., 4200; *S. v. Benson,* 183 N. C., 795, 111 S. E., 869.

In determining the question of premeditation and deliberation, it is proper for the jury to take into consideration the conduct of the prisoner, before and after, as well as at the time of, the homicide, and all the attendant circumstances. If the killing took place simultaneously with the formation of the intent to kill, there would be no premeditation. Nor would flight be evidence of it. *S. v. Steele, supra,* But if the prisoner weighed the purpose of killing long enough to form a fixed design, and at a subsequent time, no matter how soon or how remote, put it into execution, there would be sufficient premeditation and deliberation to warrant the jury in finding him guilty of murder in the first degree. *S. v. Teachey,* 138 N. C., 587, 50 S. E., 232; *S. v. Dowden,* 118 N. C., 1145, 24 S. E., 722. It is immaterial, in determining the degree of murder, how soon after resolving to kill, the prisoner carried his purpose into execution. *S. v. Covington,* 117 N. C., 834, 23 S. E., 337. Pre-

meditation means "thought of before hand" for some length of time, however short, but no particular time is required for the mental process of premeditation. *S. v. Benson, supra.* Deliberation means that the act is done in a cool state of the blood, in furtherance of some fixed design. *S. v. Walker,* 173 N. C., 780, 92 S. E., 327.

The following charge was approved in *S. v. Roberson,* 150 N. C., 837, 64 S. E., 182: "By premeditation and deliberation is meant that the reason and judgment is exercised, that the fact of the killing is weighed and considered, and that as a result there is in the mind the fixed purpose to kill. The fixed purpose to kill must precede the act of killing, although the length of time between the time it is formed and carried into effect is not material. This premeditation and deliberation, like any other fact, may be shown by circumstances, and in determining there was such the jury may consider evidence of absence of provocation, absence of a quarrel at the time of the killing, and threats, if there is such evidence. Not that you are compelled to find premeditation and deliberation from such evidence, but that if there is such evidence you may consider it in determining whether there was such premeditation and deliberation as I have indicated."

Speaking to the question in *S. v. McCormac,* 116 N. C., 1033, 21 S. E., 693, *Avery, J.,* delivering the opinion of the Court, said: "While premeditation and deliberation are not to be inferred as a matter of course from the want either of legal provocation or of proof of the use of provoking language, yet all such circumstances may be considered by the jury in determining whether the testimony is inconsistent with any other hypothesis than that the prisoner acted upon a deliberately formed purpose. *S. v. Fuller,* 114 N. C., 885. Kerr on Homicide, sec. 72, says: 'The question whether there has been deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. It has been said that an act is done with deliberation, however long or short a time intervenes after the intent is formed and before it is executed, if the offender has an opportunity to recollect the offense.' The test is involved in the question whether the accused acted under the influence of ungovernable passion, or whether there was evidence of the exercise of reason and judgment. The conduct of the accused just before or immediately after the killing would tend at least to show the state of mind at the moment of inflicting the fatal wound. In passing upon the question whether the facts in a given case are sufficient to show beyond a reasonable doubt that the killing was done with deliberation and premeditation, while sudden passion aroused by provocation that would neither excuse nor mitigate to manslaughter the killing with a deadly weapon, is sufficient, if the homicide is committed under its immediate influence, yet the want of provocation, the preparation of a

weapon, proof that there was no quarreling just before the killing, may be considered by the jury, with other circumstances, in determining whether the act shall be attributed to sudden impulse or premeditated design."

The foregoing statement has been approved in a number of cases, notably, *S. v. Cameron, supra, S. v. Daniels, supra, S. v. Stackhouse,* 152 N. C., 808, 67 S. E., 764, and *S. v. Lipscomb,* 134 N. C., 689, 47 S. E., 44.

The remaining exceptions are not of sufficient merit to warrant a new trial. The verdict and judgment will be upheld.

No error.

J. H. KING v. W. S. LEE AND TALLASSEE POWER COMPANY.

(Filed 11 December, 1929.)

Master and Servant C a—In this case held: there was no evidence of master's negligence and nonsuit was proper.

Where the evidence of the plaintiff discloses the mere fact of injury resulting from falling while elevated in a "boister saddle" operated by a fellow-servant by means of block and tackle, a nonsuit is properly entered, negligence not being ordinarily presumed from the mere fact of injury.

CIVIL ACTION, before *Sink, Special Judge,* at February Special Term, 1929, of MECKLENBURG.

Plaintiff alleged that on 7 December, 1927, he was in the employ of the Power Company, helping to erect a power house near High Rock, N. C., and that he was seriously and permanently injured by reason of negligence of defendant.

The plaintiff's narrative of his injury is substantially as follows: "I was putting in a window frame at the top of the power house, at about forty feet above the ground. I was in a boister saddle, supported with a block and tackle. Two men pulled me and the boister saddle up with their hands to the place where I was to work. They pulled me up by the fall line; I was kept up there by a man holding the rope. . . . Frank Lawrence was the person to hold the rope. He did not hold the rope, but pulled me up and tied me. I found that out when I looked back down. I looked at my watch and it was five minutes until twelve, and I told him to let me down, and I looked out of the saddle, and he was propped up on the hand rail of the stairway on one elbow; when I told him to let me down, he turned around, and I reached around to get my pliers

out of the window to put them in my pocket before I came down, and that is the last thing I remember. When I looked down Frank Lawrence did not have hold of the rope. I do not know what happened after I looked around to get my pliers out of the window. I do not remember starting to fall. Beneath where I was working, there were iron steps which lead from the switchboard floor down to the basement. It was about thirty feet from where I was in the air to the top of the iron steps and about forty feet to the ground. . . . Mr. Vickery and Mr. Lawrence and I were working on the window at the time I had the fall. I was pulled up that morning. I was in what is called a boister seat, which means a seat with a rope fastened to each end. As I worked over different points of this window, I was pulled up and lowered, so as to reach the point on the window where I had to work, by Mr. Lawrence, and Mr. Lawrence was on the ground handling the rope. That was the customary way of doing that kind of work. When I got ready to come down I called Mr. Lawrence to let me down, which he did. Mr. Lawrence did not have hold of the rope when I looked down to ask him to let me down. He was standing close to the rope, but he did not have his hand on it. I did not see Mr. Lawrence just immediately before I started to fall because, in the meantime, I reached over to get my pliers out of the window. After I reached over to get my pliers I fell. And from the time I told him to let me down until I started to fall, I did not look down at him, and don't know whether he had the rope tied to the railing or not. I didn't notice whether he had it around the railing. I had been up there at that time about a half hour or an hour. I turned around to get my pliers and then fell."

There was evidence tending to show that the plaintiff stayed in the hospital until 22 December, when he went to his home, remaining there until about 6 January, 1928, when he returned to the hospital and remained there about ten days.

There was evidence that on 19 December the defendant had paid to the plaintiff the sum of $240 in cash, in full settlement of his injury, and that plaintiff had duly executed a release. The release was pleaded as a defense, but the plaintiff offered evidence tending to show that at the time the money was paid, he did not have sufficient mental capacity to understand the nature of the transaction.

The defendant offered no evidence. Hence the plaintiff's narrative of the injury is the only evidence thereof in the record. Plaintiff took a voluntary nonsuit as to the defendant, W. S. Lee. There is evidence that the plaintiff had sustained serious injury.

At the conclusion of plaintiff's evidence the defendant moved for judgment of nonsuit, which motion was allowed, and the plaintiff excepted and appealed.

G. T. Carswell and Joe W. Ervin for plaintiff.

R. L. Smith & Sons and W. S. O'B. Robinson, Jr., for Power Company.

BROGDEN, J. There is no evidence tending to show that the boister saddle was defective or that it was not an appliance approved and in general use or in any particular an unsafe appliance; neither was there evidence that any negligent order had been given with respect to the operation thereof.

The evidence does not disclose whether the boister saddle fell or whether the plaintiff fell out of the saddle. Plaintiff testified that his fellow-servant, Lawrence, did not have hold of the rope "when I looked down to ask him to let me down. He was standing close to the rope, but he did not have his hands on it." The evidence discloses the injury and no more. It has been consistently held by this Court that the mere fact of injury is in itself ordinarily no evidence of negligence. *Fore v. Geary,* 191 N. C., 90, 131 S. E., 387; *Burke v. Carolina Coach Co., ante,* 8.

The facts presented bring the case squarely within the principle declared in *Michaux v. Lassiter,* 188 N. C., 132, 123 S. E., 310. The Court said: "Considering the record in view of these authorities and the principles they approve and establish, there has, as stated, been no breach of duty shown on the part of defendant company, the proof and admissions showing that the machine was of standard make, newly purchased and installed, and as a mechanical proposition, operating properly at the time. Nor is there anywhere evidence of default in reference to selecting the operator, and on the facts offered by the plaintiff the injury is necessarily attributable and attributable only to an exceptionally negligent act of the operator of the machine, who either failed to fasten the pan or released it in breach of his duty to his fellows. There is no testimony or suggestion that the operator had any authority over the intestate, or tending to show that he stood towards the latter in the place of his principal, being only a fellow-servant.' The injury was due solely to his default, and the court has correctly ruled that no cause of action has been shown."

A careful scrutiny of the record leads us to the conclusion that the judgment of nonsuit was properly entered.

Affirmed.

H. E. WRENN, SUCCESSOR TO KELLY & WRENN, v. LAWRENCE COTTON MILLS, INC., C. I. JONES, H. N. FAIRLY AND H. S. BLACKMER.

(Filed 11 December, 1929.)

1. Bills and Notes D b—Where parties sign note as endorsers holder may not show different liability by parol.

Where the directors of a corporation sign a negotiable instrument on the back thereof as endorsers, C. S., 3044, the holder may not show by parol that they signed as comakers, or guarantors, or sureties.

2. Bills and Notes D c—Extension of time for payment of note must be to a time definite and certain.

Where endorsers on a note waive defenses based upon an extension of time for payment, the waiver imports a legal extension, or an agreement which fixes a definite time when payment is to be made, and where no legal extension is shown by the evidence the waiver will not operate to prevent the endorsers from pleading the statute of limitations in the holders' action to recover against them on the note.

3. Limitations of Actions B a—Where there is no legal extension of time for payment of note the statute runs from its maturity.

Where the endorsers of a note waive notice of dishonor and defenses based on an extension of time for payment, and there is no agreement for an extension to a definite time, there is no legal extension of time, and where more than five years elapse from the time of the last payment on, and maturity of the notes, the three-year statute of limitations, C. S., 441, will bar the holders' action to recover against the endorsers on the note.

APPEAL by plaintiff from *Stack, J.*, at September Term, 1929, of ROWAN. No error.

The following verdict was returned:

1. Did the defendants execute and deliver to Kelly & Wrenn the five promissory notes, as alleged in the complaint? Answer: Yes (by consent).

2. Is the plaintiff the owner of said notes, as alleged in the complaint? Answer: Yes (by consent).

3. Is the plaintiff's alleged cause of action barred by the statute of limitations, as alleged in the answer? Answer: Yes.

4. What amount, if anything, is plaintiff entitled to recover? Answer: Nothing.

R. Lee Wright for plaintiff.
John C. Busby and W. T. Shuford for defendants.

ADAMS, J. On 29 November, 1920, the Lawrence Cotton Mills, Inc., executed and delivered to the firm of Kelly & Wrenn, of Waco, Texas, five promissory notes each in the sum of $5,000, payable respectively six,

nine, twelve, fifteen, and twenty-four months after date, with interest at 6 per cent from date until paid. Each note was endorsed by the defendants C. I. Jones, H. N. Fairley, and H. S. Blackmer, and was duly assigned to the plaintiff by Kelly & Wrenn, who dissolved copartnership in June, 1921. On the back of the first note the following payments are endorsed: $538.70 on 1 November, 1921; $500 on 22 December, 1922; $250 on 10 March, 1923; $250 on 10 June, 1923. No other payments were made on any of the notes. In 1921 Lawrence Cotton Mills, Inc., became and has since been insolvent. The present action, which is prosecuted against the endorsers, was commenced 4 September, 1928. The defendants pleaded the three-year statute of limitations. Each note contains the following stipulation: "The drawers and endorsers and all sureties hereto severally waive presentment for payment, protest, and notice of protest, and nonpayment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them or either of them. Witness our hands and seals."

The jury were instructed if they believed all the evidence to answer the third issue "Yes" and the fourth "Nothing." The plaintiff excepted. Judgment was given for the defendants and the plaintiff appealed upon error assigned.

The plaintiff's evidence (none was introduced by the defendants) consists of the notes, certain admissions in the pleadings, and the depositions of three nonresident witnesses. It is not denied that the plaintiff is the owner and holder of the notes.

The plaintiff offered evidence tending to prove that the defendants orally agreed when the notes were executed to "remain liable and responsible until the notes were paid." The proposed testimony was properly excluded. The notes constitute the written contract of the parties, and the plaintiff sought to vary the written terms by parol.

The Negotiable Instrument Law was ratified on 8 March, 1899. P. L., 1899, ch. 733. Before this date our decisions were generally to the effect that when third persons wrote their names on the back of a negotiable instrument before delivery to the payee, the original parties as between themselves could show their intent and the nature of their obligation—whether they had affixed their signatures as joint promisors, as guarantors, or as endorsers. *Lilly v. Baker,* 88 N. C., 151; *Barden v. Hornthal,* 151 N. C., 8. But a complete change was wrought by the enactment of the new law, which provides that a person who writes his name upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an endorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. C. S., 3044. See, also, section 3045. These sections supersede the former law. Daniel on Negotiable

Instruments, 6 ed., 806; Brannan's Neg. Instruments Law, 4 ed., 588. In *Bank v. Wilson,* 168 N. C., 557, the Court, after pointing out the change referred to, remarked that the purpose of these sections is to fix the status of the defendants as endorsers.

The plaintiff proposed to change this status by oral testimony that the defendants endorsed the notes as comakers, or guarantors, or sureties; but in the case last cited the Court said that one of the objects of the statute is to exclude parol evidence to the effect that the status of the parties is otherwise than as fixed by the law. We are not at liberty to give the endorsement an effect which in terms the statutes reject. The principle is restated and sustained in *Meyers v. Battle,* 170 N. C., 168; *Busbee v. Creech,* 192 N. C., 499; and it is clearly sustained by the weight of authority elsewhere. Brannan's Neg. Instruments Law, 4 ed., 578, 589; 5 Uniform Laws, Annotated, 307. It is not the purpose of the statutes to prevent the defendants from showing that they are accommodation endorsers or the relation they sustain to one another. *Meyers v. Battle, supra.* The logical result is that the liability of the Lawrence Cotton Mills, Inc., is primary and that of the defendants, secondary. *Houser v. Fayssoux,* 168 N. C., 1; *Horton v. Wilson,* 175 N. C., 533; *Barber v. Absher Co., ibid.,* 602; *Dillard v. Mercantile Co.,* 190 N. C., 225.

The corporation became insolvent in 1921; the defendants became accommodation endorsers in 1920. As such they were entitled to the rights and immunities which attach to the status of endorsers, although they may have been directors of the corporation. *Houser v. Fayssoux, supra;* Brannan's Neg. Instruments Law, 580. See, also, *Barber v. Absher Co., supra.*

An endorser is, of course, entitled to notice of dishonor; and it may be conceded that by the terms of this contract the defendants waived such notice; also that they waived defenses based upon an extension of the time of payment. The latter waiver, however, imports a legal extension of time which would be effective against the defendants. Granting that the time of payment may be extended by a definite and binding oral agreement *(Oliver v. Fidelity Co.,* 176 N. C., 598), we are confronted by the general rule that such an agreement must fix a definite time when payment is to be made. The time thus agreed on should be as definite as that which is required when the note is originally executed, the elements of the agreement being certainty, mutuality, and consideration. *McInturff v. Gahagan,* 193 N. C., 147; 8 C. J., 425, sec. 626, *et seq.* No evidence received or offered in regard to the extension of time purported to designate a definite period. In fact, if the excluded evidence had been admitted it would have shown affirmatively that no such time was agreed on and that the asserted extension was altogether indefinite. In contemplation of law there was no binding agreement for an extension of time.

The plaintiff's cause of action is therefore barred. Three years is the period prescribed for the commencement of an action upon a contract, obligation, or liability arising out of a contract, express or implied. C. S., 441. More than five years elapsed between the date of the last payment, the maturity of the last note, and the commencement of the action.

It follows from what we have said that no error was made in declining the plaintiff's prayers or in giving a directed instruction to the jury upon the last two issues.

No error.

H. M. BURDEN v. TOWN OF AHOSKIE ET AL.

(Filed 11 December, 1929.)

Municipal Corporations H b—In this case held: ordinance in respect to erection of filling stations was not uniform, and was void.

A town ordinance which attempts to prohibit the erection of gasoline filling stations within three hundred feet of the public schools of a town is void when there are already filling stations therein within the restricted area, the ordinance not being uniform in its application, and having the effect of giving the filling stations already erected a monoply, and the plaintiff is entitled to mandamus to compel the issuance of a permit for a filling station on his land within the area, and his right to this relief is not affected by a third ordinance requiring that the filling stations already erected be removed by a certain date in the future, the owners of the existing filling stations not being parties to the action and their right to operate said filling stations after the date fixed not being before the Court.

CIVIL ACTION, before *Midyette, J.* From HERTFORD.

On 30 August, 1926, the board of commissioners of Ahoskie adopted the following ordinance: "No building or construction shall be begun or enlarged within the corporated limits of Ahoskie unless a general description, location and approximate cost of same are submitted to and approved by the mayor and a majority of the commissioners," etc.

Thereafter on 20 May, 1929, the town of Ahoskie adopted the following ordinance: "It shall be unlawful for any person, firm or corporation, to build, erect or maintain any dance hall, gasoline filling station, carnival or tent show, or pool room within three hundred feet of the property of the Ahoskie Graded School," etc.

The plaintiff, in April, 1929, purchased a lot at the intersection of the west margin of West Main Street with the northern margin of the State highway, which said lot is 166.5 feet from the school building. On 13 May, 1929, the plaintiff duly applied to the mayor and board of com-

missioners of the town of Ahoskie for a building permit to construct and operate on said lot an automobile service station commonly known as a "filling station," agreeing if the permit were issued to conform to all building laws and regulations. On 20 May, 1929, after adopting the second ordinance above referred to, the board of commissioners and mayor declined to grant the permit. Thereupon on 29 May, plaintiff instituted a civil action against the town of Ahoskie and the commissioners of said town for the purpose of compelling said defendants by mandamus to issue a building permit for the construction of said filling station.

After suit was instituted a third ordinance was adopted by the town, reading as follows: "It shall be unlawful for any person, firm or corporation, to build, erect or maintain any dance hall, gasoline filling station, carnival or tent show, or pool room within three hundred feet of the property of the Ahoskie Graded School; . . . and any person, firm or corporation violating this ordinance shall incur a penalty of $50 for each offense: . . . *Provided* that any dance hall, gasoline filling station, carnival or tent show which may now be in operation or process of construction within 300 feet of said school property shall have until 1 January, 1930, to be removed therefrom."

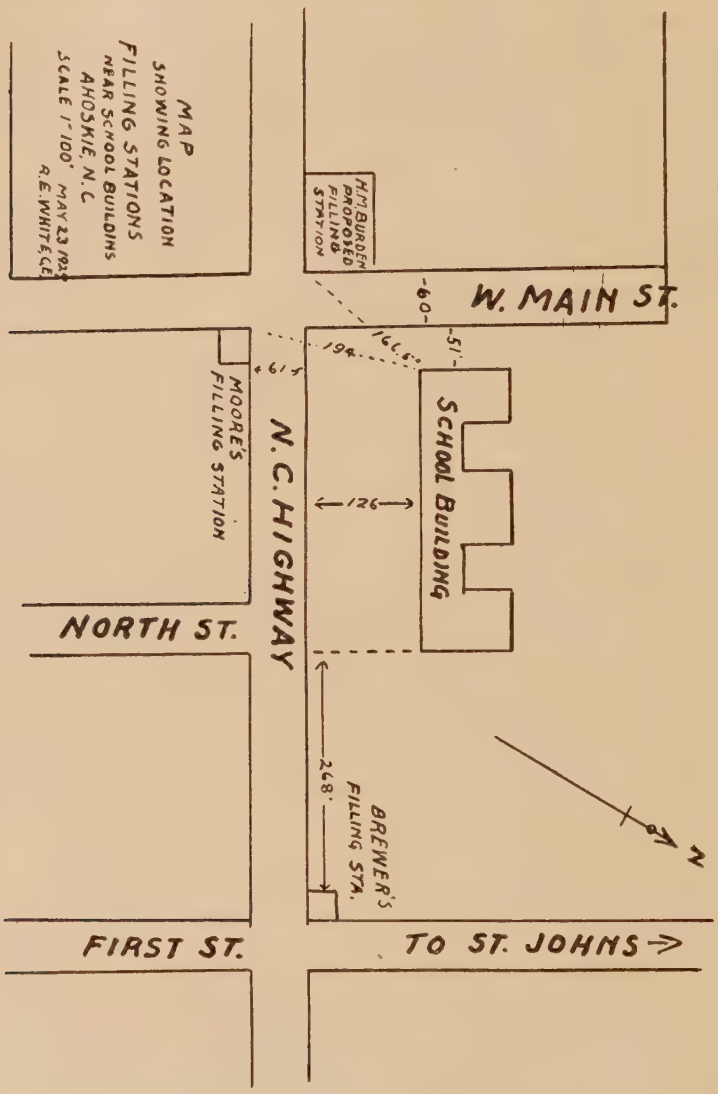
It appears from the record that at the time the plaintiff applied for a permit there were two filling stations in operation within 300 feet of the school building. One, known as Moore's filling station, is situated 194 feet from the school property, and the other, known as Brewer's Filling Station, is situated 268 feet from the school building. The location of the filling stations in operation and the location of plaintiff's lot is shown on the map hereto attached.

The judge of the Superior Court denied the writ of mandamus and the plaintiff appealed.

A. T. Castelloe for plaintiff.
Travis & Travis and Alvah Early for defendants.

BROGDEN, J. Are ordinances of a municipality valid, which prohibit the erection of a filling station within 300 feet of a school building, when there are now two other filling stations of similar kind constructed and in operation within a distance of 300 feet from said building?

In *Bizzell v. Goldsboro,* 192 N. C., 348, 135 S. E., 50, it was written: "The law does not permit the enjoyment of one's property to depend upon the arbitrary or despotic will of officials, however well-meaning, or to restrict the individual's right of property or lawful business without a general or uniform rule applicable to all alike."



In substance and effect the ordinances under consideration in the case at bar are similar to the ordinances involved in the case of *Clinton v. Oil Co.*, 193 N. C., 432, 137 S. E., 183. In that case the Court said: "The principle is well settled that ordinances must be uniform, fair, and impartial in their operation. . . . There can be no discrimination against those of the same class. The regulation must apply to all of a

class. An ordinance that grants rights—the enjoyment must be to all, upon the same terms and conditions. An ordinance cannot penalize one and for the same act, done under similar circumstances, impose no penalty. No ordinance is enforceable in matters of this kind, a lawful business, that does not make a general or uniform rule of equal rights to all and applicable to all alike—then there can be no special privilege or favoritism." The Court further said: "The present ordinance does not regulate, but keeps alive the six gasoline places inside the fire limits where gasoline is sold, and prohibits defendant from carrying on a like legitimate business in the same limits. It discriminates against defendant and gives a monopoly to those now carrying on the business in the district. It is no regulation; it is a prohibition."

Applying these announced principles of law to the facts appearing in the record, it is manifest that the ordinances give life to the two filling stations now in operation within a distance of 300 feet, but pronounce the sentence of death upon any other filling station of like kind and character within the identical area. In the terse language of the *Clinton case, supra,* "this is not regulation, but prohibition."

It is strenuously argued that the effect of the third ordinance, passed after the action was instituted, is to remove the filling stations now in said area by 1 January, 1930, and that therefore on that date no filling station will be permitted within the area. Hence there would be no monopoly or discrimination. The fact that the ordinance was passed after the suit was instituted has no bearing upon the question at issue. *Refining Co. v. McKernan,* 179 N. C., 314, 102 S. E., 505. However, the plaintiff is entitled to have his case considered upon the record as it now appears. Certainly it is not unlawful for these filling stations now in the area to operate until 1 January. The ordinance expressly recognizes such right. The owners of these operating filling stations are not parties to this action, and hence the right to operate said filling stations after 1 January, 1930, is not now before this Court.

The sole question for determination is whether the plaintiff is entitled to the relief requested upon the record as now presented. A consideration of the case, in such aspect, leads to the conclusion, under the circumstances, that the plaintiff was entitled to the relief sought for, and the judgment is reversed.

A discussion of the principles of law involved in the action may be found in 18 A. L. R., 93; 29 A. L. R., 450; 34 A. L. R., 507; 42 A. L. R., 978; 49 A. L. R., 767, and 55 A. L. R., 252.

Reversed.

E. S. DELANEY v. R. H. HART.

(Filed 11 December, 1929.)

Deeds and Conveyances C g—Where development is not made according to general scheme, owners therein may not enforce restrictions.

Where the Court finds upon facts agreed that restrictions in deeds in a development were not enforceable by the owners of other lots therein for the reason that the subdivision was not developed or mapped by the developing company in accordance with a general plan or scheme, and that the restrictions were not enforceable by the developing company or any one claiming under it, for the reason that the developing company, a corporation, had been dissolved, his judgment that the owner in the subdivision could transfer his lot to another free from the restrictions, except as to one applicable to all the lots, will be upheld on appeal.

APPEAL by defendant from *Sink, Special Judge,* at September Special Term, 1929, of MECKLENBURG. Affirmed.

This is a controversy without action heard upon a statement of facts agreed. C. S., 626.

Plaintiff contends that upon the facts agreed he is entitled to a decree for the specific performance of a contract in writing by which (1) plaintiff agreed to sell and convey to defendant a certain described lot of land, in fee simple, without restrictions, except as to its occupancy or ownership by persons of the colored race, and (2) defendant agreed to purchase from plaintiff the said lot of land, and to pay to plaintiff for the same the agreed purchase price upon the conveyance to him by plaintiff of the said lot of land in accordance with said contract.

Plaintiff has tendered to defendant a deed properly executed, with the usual covenants of warranty, sufficient in form to convey to defendant the said lot of land in fee simple, without restrictions, except as to its occupancy or ownership by persons of the colored race.

Defendant has declined to accept said deed, and has refused to pay to plaintiff the purchase price for said lot of land, in accordance with the terms of the contract.

Defendant contends that plaintiff cannot perform his contract with respect to the conveyance to him of said lot of land, for the reason that plaintiff holds his title to said lot of land subject to certain restrictions set out in the deed by which said lot of land was conveyed to plaintiff, and that plaintiff cannot convey the same free from said restrictions.

Upon the facts agreed, the court was of opinion, and so held, that plaintiff can convey to defendant said lot of land, free from restrictions, as to its use or otherwise, except as to its occupancy or ownership by persons of the colored race.

From judgment in accordance with the opinion of the court that defendant specifically perform his contract with plaintiff, defendant appealed to the Supreme Court.

J. L. DeLaney for plaintiff.
Cansler & Cansler for defendant.

Per Curiam. Plaintiff's title to the lot of land which he has contracted to sell and convey to defendant, without restrictions, except as to its occupancy or ownership by persons of the colored race, is held by him under deeds which contain other restrictions as to its use upon the grantee, his heirs, and assigns in each of said deeds.

The vital question involved in this controversy is whether or not these restrictions are enforceable against plaintiff, his heirs or assigns (1) by the Highland Parks Company which first imposed said restrictions upon the title to said lot, or (2) by the owners of other lots of land, who hold title to the same under the Highland Parks Company and its grantees.

The court was of opinion, and so held, that upon the facts agreed, these restrictions are not enforceable by the owners, present or future, of the other lots formerly owned by the Highland Parks Company, for the reason that the tract of land which was divided into blocks, and subdivided into lots was not planned, developed or mapped by the said company in accordance with a general plan or scheme, and that therefore the owners of said other lots have no right to enforce the restrictions contained in the deeds under which plaintiff holds title to the lot which he has contracted to sell and convey to defendant.

The court was further of opinion, and so held, that upon the facts agreed, these restrictions are not now enforceable by the Highland Parks Company, or by any person or corporation claiming under said company, for the reason that said Highland Parks Company, a corporation organized under the laws of this State, has been dissolved.

We concur in the opinion of the court. The judgment is affirmed. *Thomas v. Rogers,* 191 N. C., 736, 133 S. E., 18; *Davis v. Robinson,* 189 N. C., 589, 127 S. E., 697; *Snyder v. Heath,* 185 N. C., 362, 117 S. E., 294. The instant case is distinguishable from *Johnston v. Garrett,* 190 N. C., 835, 130 S. E., 835. The lot involved in that case was included in a tract of land which was planned, developed and mapped under a general scheme or plan. It was held that the owners of lots included in the development and conveyed with restrictions applicable to all the lots, could enforce as against the owner of any one of the lots, the restrictions for the reason that the restrictions were for the mutual protection of the owners of all the lots.

Affirmed.

RAY BENNETT v. WHIPPETT-KNIGHT COMPANY.

(Filed 11 December, 1929.)

Fraud A b—Purchaser having equal means of information and opportunity to inspect car may not maintain action for fraud.

Where the evidence discloses that the purchaser of a second-hand automobile had equal means of information with the seller as to the age and running condition of the car, and that the purchaser was not prevented from making a full and thorough examination of the car before the contract of purchase was entered into: *Held*, the purchaser may not successfully maintain an action for fraud for representation as to its age or running condition.

CIVIL ACTION, before *MacRae, Special Judge,* at August Term, 1929, of YANCEY.

Plaintiff alleged that on 16 April, 1929, he exchanged his Overland car with the defendant in return for "one 1926 model Oldsmobile." Plaintiff further alleged that at the time of the exchange the defendant represented that the Oldsmobile "was a 1926 model, was in good condition, and in good running order." The plaintiff further alleged that in truth and in fact said car was a 1925 model, and not in good running condition; that his Overland was worth $125 at the time of the exchange, and that he had paid $30 in cash and $9.30 for repairs, making a total of $164.30, which he sought to recover in this action.

At the conclusion of plaintiff's evidence there was judgment of nonsuit and the plaintiff appealed.

Watson & Fouts for plaintiff.
McBee & McBee and Chas. Hutchins for defendant.

PER CURIAM. The record discloses that the plaintiff was a graduate of a junior college and engaged in teaching school. On 16 April, 1929, at the time of exchanging cars, plaintiff signed an affidavit which contained a statement that the Oldsmobile he received from the defendant was a 1925 model. He testified that he signed this paper-writing upon the representation of the bookkeeper of defendant that a controversy had arisen between "the Oldsmobile people and the State of North Carolina; that it was sold as a 1925 model, and the State of North Carolina gave title for the year the car was sold and not for the model of the car." Plaintiff further testified: "I drove the car some before I traded for it. . . . After I had tried it out I told them to go ahead and fix up the papers, and I signed the papers at Spruce Pine with an explanation which the bookkeeper gave to me. . . . I had every opportunity to

look into the car and investigate it, but Mr. Shuford said it was in good condition, and I took his word for it."

We do not think the evidence of fraud was sufficient to be submitted to the jury. It is obvious from the evidence that the parties had equal means of information, and that the plaintiff was not prevented from making a full and thorough examination and test of the property before the contract was entered into. *Peyton v. Griffin,* 195 N. C., 685, 143 S. E., 525; *Cromwell v. Logan et al.,* 196 N. C., 588, 146 S. E., 233.

Affirmed.

ETHEL COLLINS AND HUSBAND, BRIGHT COLLINS, v. GORDON BASS.

(Filed 18 December, 1929.)

1. Mortgages H m—Purchaser at foreclosure sale is entitled to immediate possession and to crops as against tenant of mortgagor.

Where the mortgagee has not entered upon the mortgaged lands after the maturity of the note secured by the mortgage, or where the crops are severed before entry, he is not entitled to the crops; but otherwise where there is no reservation of the growing crops by the mortgagor, and the mortgagee has entered upon the land; and where the mortgagor under a prior registered mortgage has leased the lands, and the mortgage has been foreclosed, the purchaser at the foreclosure sale is entitled to the growing crops and the immediate possession of the mortgaged premises, the lessee being regarded as having only acquired the rights of the mortgagor, and as tenant-at-will of the mortgagee after the maturity of the debt.

2. Landlord and Tenant D g—Lessee of mortgagor is not entitled to emblements as against purchaser at foreclosure sale.

The right of the lessee of the mortgagor to the crops for the year in which they are planted as against the purchaser at the foreclosure sale of a prior registered mortgage rests at common law unaffected by statute, and the doctrine of emblements as against a remainderman and the statutes passed in regard to those furnishing money or material for the growing crops are not applicable. C. S., 2347, 2480, 2481.

APPEAL by defendant from *Clement, J.,* at August Term, 1929, of UNION. Affirmed.

Action brought by plaintiffs against the defendant to recover a certain tract of land. The court below found as facts and rendered judgment as follows:

"The defendant, Gordan Bass, rented the said lands for the year 1929, in the fall of 1928, from J. N. Davis (mortgagor), the holder of the legal title, and had begun a crop upon said lands at the time of the foreclosure

of the mortgage deed. The court being of the opinion that the plaintiff, as a matter of law, was entitled to recover, declined to submit any issues to the jury, but signed judgment, said judgment being as follows:

The above-entitled action coming on to be heard before the undersigned judge, and the jury having been empaneled to try the issues joined between the plaintiffs and the defendants, and the court, after hearing the pleadings read and the defendant admitting that J. N. Davis and wife executed a mortgage deed to Bettie J. Collins on 17 December, 1927, and that the same was registered on the same day in Book AV, at page 138, in the office of the register of deeds of Union County, North Carolina, covering the lands in controversy, and that a note was secured by the mortgage, maturing on 19 December, 1927, and that thereafter, to wit, on 30 March, 1929, the said Bettie J. Collins, mortgagee, foreclosed said mortgage and sold the same at public auction on said date, and that Ethel Collins became the last and highest bidder for said lands and that deed was made to her on 10 April, 1929, and registered on the same day in Book 69, at page 248;

And it further appearing to the court that the defendants agreed that the date of mortgage, as above set forth, and the date of the foreclosure proceeding as is herein stated, and also the date of the note secured by said mortgage, had matured, and it further appearing to the court that the defendant, Gordon Bass, claims to have rented said lands in the fall of the year 1928, and while said mortgage appeared there of record, and the court being of the opinion that as a matter of law the plaintiffs are entitled to the relief sought in said complaint, it is now, therefore, ordered, adjudged and decreed that the plaintiffs are the owners of, and entitled to the immediate possession of the lands described in the complaint, and that a writ of ejectment issue ejecting the defendant, Gordon Bass, from the land and placing the plaintiffs in possession of said lands and also that the plaintiffs recover of the defendant, Gordon Bass, the costs of this action.

And it further appearing to the court that the defendant, J. N. Davis, having disclaimed any interest in the matters involved in this action, as shown by his answer filed, he is permitted to go without day and recover of the plaintiffs any costs he may have expended."

The defendant excepted, assigned error and appealed to the Supreme Court.

Vann & Milliken for plaintiffs.
W. O. Lemmond and John C. Sikes for defendant.

CLARKSON, J. The question involved: Is the purchaser at a foreclosure sale under a mortgage entitled to recover possession of the prop-

erty from a lessee or tenant of mortgagor, claiming to hold under a lease made after maturity of the mortgage indebtedness? We think so.

In *Jones v. Hill,* 64 N. C., 199-200, citing numerous authorities, the law is thus stated: "If a mortgagor remains in possession after the forfeiture of the property, he remains only by permission of the mortgagee. In such case the mortgagor has been sometimes called a tenant at will or sufferance, and sometimes a trespasser; but he is properly neither; his position cannot be more accurately defined than by calling him a mortgagor in possession, but he may be ejected at any time by the mortgagee, without notice. . . . That is no injustice in this, because the land, including all its products, is a security for the mortgage debt, and to that extent the property of the mortgagee. The mortgagor has no right to make a lease, to the prejudice of the mortgagee; the lease is void if the mortgagee elects to hold it so. . . . If the mortgagor could lease, he might altogether defeat the claim of the mortgagee." *Keathly v. Branch,* 84 N. C., 202; *Brewer v. Chappell,* 101 N. C., 251; *Killebrew v. Hines,* 104 N. C., 182; *Cooper v. Kimball,* 123 N. C., 120; *Montague v. Thorpe,* 196 N. C., 163.

Where the mortgagee has not entered, or where the crops are severed before entry, he has no right to them. *Killebrew's case, supra.*

In *Killebrew v. Hines, supra,* at p. 193, we find: "The case of *Brewer v. Chappell,* and *Coor v. Smith, supra* (101 N. C., 261), in so far as they are inconsistent with the principle declared in this opinion, are overruled."

The following principle is now well settled in this jurisdiction: 19 R. C. L., part sec. 444, p. 628: "It is generally held that if the sale is completed and title is vested in the purchaser while a crop is still unsevered and growing, and there has been no reservation or waiver of the right to the crop, the title and right to same will pass to the purchaser with the land. And this is true as against the mortgagor, as against his execution creditors, and as against a tenant or lessee holding under him by a lease subsequent to the mortgage."

In *Hayes v. Wrenn,* 167 N. C., at p. 230, we find the following: "Under the common law, 'the tenant for life, or his representative, shall not be prejudiced by any sudden determination of his estate because such a determination is contingent and uncertain. Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executor shall have the *emblements* or profits of the crop, for the estate was determined by the act of God, and it is a maxim in the law that *actus die nemini facit injuriam.* The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labor and expense for tilling, manuring, and sowing the lands, and also for the encouragement of husbandry, which being a public benefit, tending to the increase and

plenty of provisions, ought to have the utmost security and privilege the law can give it.' 2 Bl. Com., 122; Taylor on L. and T., 355; *Gee v. Young,* 1 Hay., 17; *Poindexter v. Blackburn,* 36 N. C., 286." The common law being in force in this jurisdiction and the representatives of the life tenant upon his uncertain tenure from death being entitled to the emblements, C. S., 2347 (Revisal, sec. 1990) was passed. This was done to protect the right of the remainderman and to secure for him his rent for the part of the year which had not elapsed at the time his title vested. Under the statute the remainderman is entitled to a part of the rent proportionate to the part of the year elapsing after the termination of the life estate to the surrendering of possession to the remainderman. *King v. Foscue,* 91 N. C., 116.

C. S., 2480 (N. C. Code, 1927, Anno.), is as follows: "If any person makes any advance either in money or supplies to any person who is engaged in or about to engage in the cultivation of the soil, the person making the advance is entitled to a lien on the crops made within one year from the date of the agreement in writing herein required upon the land in the cultivation of which the advance has been expended, in preference to all other liens, except the laborer's and landlord's liens, to the extent of such advances. Before any advance is made an agreement in writing for the advance shall be entered into, specifying the amount to be advanced, or fixing a limit beyond which the advance, if made from time to time during the year, shall not go; and this agreement shall be registered in the office of the register of the county where the person advanced resides: *Provided,* that the lien shall continue to be good and effective as to any crop or crops which may be harvested after the end of the said year."

C. S., 2481: "The preceding section shall apply to all contracts made for the advancement of money and supplies, or either, for the purposes herein specified by mortgagors or trustors who may be in possession of the lands mortgaged or conveyed in trust at the time of the making of the contract for such advancement of money or supplies, either in case the debts secured in said mortgage or deed of trust be due or not."

C. S., 2481, *supra,* was passed by the General Assembly of 1889, ch. 476. This was an amendment to 1799 of the Code, which with certain other amendments is C. S., 2480 (N. C. Code, 1927, Anno.), *supra.* This act of 1889 was passed, no doubt, to meet the decision in *Brewer v. Chappell,* 101 N. C., 251, decided September Term, 1888, and it will be noted that C. S., 2481, distinctly says, "Either in case the debt secured in said mortgage or deed of trust *be due or not.*"

In *Nichols v. Speller,* 120 N. C., at p. 78, it is held: "Section 1799 of the Code (C. S., 2480, *supra)* was not intended simply to permit a person to give a lien upon his crop for advances; but also to give such a

lien for *'preference to all other liens existing or otherwise* to the extent of such advance.' (Since changed, see 2480, *supra,* but the change does not affect the principle the case is cited to apply.) Therefore, it should be strictly construed when the rights of other creditors intervene. Even where such claims do exist, it has been held that the mortgagor must determine his own needs in conducting his farm, and that his acceptance must be deemed conclusive between the parties, and not less so upon the claim of a subsequently derived title, and that the plaintiff was not bound to see that the property was used on the farm—his duty being discharged by furnishing it. *Womble v. Leach,* 83 N. C., 84." *Wooten v. Hill,* 98 N. C., 48; *Killebrew v. Hines, supra; Tob. Asso. v. Patterson,* 187 N. C., 252.

Under the law now existing in this jurisdiction, whenever one takes a mortgage or deed in trust on farm lands, he does it with notice of this statute giving an agricultural lien for advances within one year from the date of the agreement if the statute is complied with. The mortgage or deed in trust, *whether due or not,* is subject to the provisions of this statute. It is a wise statute to enable mortgagors and trustors to obtain advances to make the crop, and made for the benefit of agriculture.

In *Wooten v. Hill, supra,* at p. 53, it is said: "All laws relating to the subject-matter of a contract enter into and form a part of it, as if they were 'expressly referred to or incorporated in its terms.' *O'Kelly v. Williams,* 84 N. C., 281; *Lehigh Water Co. v. Easton,* 121 U. S., 391. It impairs the obligation of no contract." *Ryan v. Reynolds,* 190 N. C., 563; *Steele v. Ins. Co.,* 196 N. C., 408.

There is no statute in this State giving the lessee or tenant of a mortgagor or trustor after default *any right to the crop for the year in which it is planted.* It might be wise to have such legislation, but this is for the General Assembly and not for us.

The cases of *Ford v. Green,* 121 N. C., 70; *Leach v. Curtin,* 123 N. C., 85, and *Warrington v. Hardison,* 185 N. C., 76, do not conflict with the position taken in this case. Nor is C. S., 2347, applicable to the facts here disclosed. But compare *Warrington v. Hardison, supra,* with *Ford v. Green* and *Montague v. Thorpe, supra,* and see, also, *Stevens v. Turlington,* 186 N. C., 192. For the reasons given, the judgment below is

Affirmed.

J. A. GREEN v. FORSYTH FURNITURE LINES, INC., AND W. A. BLAIR.

(Filed 18 December, 1929.)

Corporations D d—Endorser of stock in blank may not recover of bona fide purchaser or corporation for fraud of another in procuring his endorsement.

Where the owner of certificates of stock in a corporation endorses them in blank, and they are purchased by a third person, the purchaser has the right to have the shares he has thus purchased canceled on the books of the corporation and new certificates issued to him, and where it appears that such purchaser paid the reasonable value of the shares at the time, in good faith, without knowledge or notice of fraud in the procurement of the seller's endorsement in blank, it is immaterial whether the corporation issuing the new shares had notice of the fraud, or mistakenly advised the seller that the shares had not been transferred at the time the seller advised the corporation not to transfer them, and the seller may not recover of the corporation for so transferring the shares, or against the purchaser.

APPEAL by defendant, Forsyth Furniture Lines, Inc., from *Cowper, Special Judge,* at April Term, 1929, of MONTGOMERY. Reversed.

Action to compel the defendant corporation to issue to plaintiff its certificate showing that plaintiff is the owner of ten shares of its stock, or in lieu thereof to recover of said defendant damages for the wrongful transfer by said defendant of said shares of stock on its books from plaintiff to the defendant, W. A. Blair, and another.

The defendant, Forsyth Furniture Lines, Inc., is a corporation organized under the laws of this State, with its office in the city of Winston-Salem, N. C. On 29 August, 1922, the said defendant issued to plaintiff its certificate No. 88 for ten shares of its stock showing that plaintiff was the owner of said shares of stock. The said shares of stock were transferable on the books of the corporation, and upon the presentation to it of said certificate No. 88, properly endorsed by the plaintiff, it was the duty of said corporation to transfer said shares of stock to the holder of said certificate.

On 3 May, 1926, at his home in Montgomery County, N. C., plaintiff endorsed his said certificate in blank and delivered same to one Dorsey Brockett; the said Dorsey Brockett procured the delivery of said certificate, properly endorsed by plaintiff, to him, by means of false and fraudulent representations. The said Dorsey Brockett falsely and fraudulently represented to the plaintiff that he was the agent of the defendant corporation, and that said corporation had an offer for the purchase of said shares of stock from plaintiff; that he would remit to plaintiff for the proceeds of the sale of his stock, or would return the

certificate to plaintiff within thirty days. Relying upon these false and fraudulent representations, plaintiff endorsed his certificate in blank, and delivered same to the said Dorsey Brockett.

On 4 May, 1926, the said Dorsey Brockett sold and delivered the said certificate to the defendant, W. A. Blair, at his office in Winston-Salem, N. C. The said W. A. Blair paid to the said Dorsey Brockett for said certificate the sum of $600. This sum was the fair market value of ten shares of the stock of the defendant corporation on said date. At the time of the sale and delivery to him of the said certificate of stock, the said W. A. Blair had no notice of the false and fraudulent representations, by means of which the said Dorsey Brockett had procured the said certificate from plaintiff. Dorsey Brockett has not paid to plaintiff the sum of money received by him from the said W. A. Blair for said certificate, nor has he accounted with plaintiff for said sum of money.

On 5 May, 1926, the said W. A. Blair, as the owner of said certificate for ten shares of its stock, presented the same to the defendant corporation, at its office in Winston-Salem, N. C., and requested said corporation to cancel said certificate, and to issue in lieu thereof two new certificates, each for five shares of its stock, one to him, and one to Mrs. W. A. Blair. In accordance with this request, certificate No. 88, issued to plaintiff, and delivered by him to Dorsey Brockett, properly endorsed by plaintiff, was canceled by the defendant corporation, and thereafter two new certificates, each for five shares of stock, one in the name of W. A. Blair, and one in the name of Mrs. W. A. Blair, were issued by said corporation, and delivered by it to the defendant, W. A. Blair. That said W. A. Blair and Mrs. W. A. Blair are now the holders of said certificates, and by virtue thereof each is the owner of five shares of the stock of the defendant corporation.

In response to issues submitted by the court, the jury found that defendant corporation had notice of the false and fraudulent representations by means of which Dorsey Brockett procured the delivery to him by plaintiff of the certificate in plaintiff's name at or prior to the date of the transfer of said stock by defendant corporation from plaintiff to W. A. Blair and Mrs. W. A. Blair; that prior to the date of such transfer, plaintiff had requested the said defendant corporation not to cancel his certificate, or to transfer his stock on its books to the holder of said certificate, for the reason that said certificate had been obtained from the plaintiff by Dorsey Brockett, by means of false and fraudulent representations; and that said defendant corporation had wrongfully transferred said stock on its books from plaintiff to defendant, W. A. Blair, and Mrs. W. A. Blair.

From judgment on the verdict, ordering and directing the defendant corporation to issue to plaintiff its certificate showing that plaintiff is

the owner of ten shares of its stock, or in lieu thereof, that plaintiff recover of said defendant the sum of six hundred dollars, the fair market value of ten shares of its stock, as found by the jury, the defendant, Forsyth Furniture Lines, Inc., appealed to the Supreme Court.

Armstrong & Armstrong for plaintiff.
Fred S. Hutchins for defendant.

CONNOR, J. The weight of the evidence offered at the trial of this action by the plaintiff does not, we think, sustain the allegations of the complaint, which are denied in the answer, to the effect that at or prior to the transfer of the stock on its books, the defendant corporation had notice of the false and fraudulent representations by means of which Dorsey Brockett had procured from plaintiff his certificate of stock, properly endorsed by him; that prior to such transfer, plaintiff had requested said corporation not to cancel said certificate or to transfer his stock, upon presentation of said certificate by the holder thereof, for the reason that the same had been obtained from him by means of false and fraudulent representations made to plaintiff by Dorsey Brockett, and that by reason of such notice and such request, the transfer of said stock on its books by the defendant corporation was wrongful. The evidence tends strongly to show that said stock was transferred on its books by the defendant corporation on 5 May, 1926, and that plaintiff did not notify said defendant of the circumstances under which he endorsed his certificate and delivered same to Dorsey Brockett, until 8 June, 1926. On 11 June, 1926, the treasurer of the defendant corporation, in reply to a letter from plaintiff dated 8 June, 1926, advised plaintiff that the stock had not been transferred at the date of his letter. There was evidence tending to show that at the date of his letter to plaintiff, the treasurer did not know that prior to 8 June, 1926, the stock had been transferred by another officer of the corporation. It is immaterial whether or not the treasurer of the corporation was negligent in failing to examine the stock book of the corporation before writing the letter to plaintiff, advising him that the stock had not been transferred, at the date of said letter, for the reason that all the evidence offered by plaintiff shows that the certificate, properly endorsed by plaintiff, had been sold and delivered by Dorsey Brockett to W. A. Blair, an innocent purchaser for value, on 4 May, 1926.

It is said in Cook on Corporations, 8 ed., Vol. 2, sec. 438, that "Shares of stock are the same as other kinds of property, in that a person who has been deprived of his stock by fraud cannot follow the stock and take it from the hands of a bona fide purchaser for value. The remedy of the defrauded person is for damages against the person defrauding him, or

for a retransfer of the stock, if the latter still holds it, together with an injunction against the transfer of the latter. But if the person obtaining the stock by fraud sells it, even in violation of an injunction, the bona fide purchaser for value and without notice, is protected."

The evidence offered by plaintiff tends to show that the defendant, W. A. Blair, was an innocent purchaser of the certificate, properly endorsed by plaintiff, for value; there was no evidence to the contrary. By his purchase of said certificate, although from Dorsey Brockett, who had procured it from plaintiff by fraud, and who therefore had no title to the certificate as against the plaintiff, the said W. A. Blair became the owner of the ten shares of stock, for which the certificate had been issued to plaintiff by the defendant corporation. As such owner, the said W. A. Blair had the right to require the defendant corporation to cancel said certificate, and to issue in lieu thereof new certificates, thus transferring the stock on the books of the corporation. Upon the presentation of said certificate, properly endorsed by plaintiff, to it by the said W. A. Blair, with the request that same be canceled, and that new certificates be issued in lieu thereof, it was the duty of the defendant corporation to comply with said requests, notwithstanding it had notice of the false and fraudulent representations by means of which Dorsey Brockett had procured the certificate from plaintiff, if the said W. A. Blair was an innocent purchaser for value, of said certificate. Defendant corporation cannot be held liable to plaintiff in this action when all the evidence was to the effect that W. A. Blair was an innocent purchaser, for value, of the certificate and therefore the owner of the stock.

Defendants' motion at the close of the evidence for judgment dismissing the action as of nonsuit should have been sustained. The judgment must be

Reversed.

GEORGE A. LANCASTER v. B. & H. COACH LINE, INC.

(Filed 18 December, 1929.)

Highways B c—Where there is evidence that unlawful rate of speed was proximate cause of injury nonsuit is properly denied.

Where a passenger in a bus operated by a coach line has been injured in a collision between the bus and an automobile going in the opposite direction, driven negligently from one side of the road to the other, and there is evidence that the bus was exceeding the statutory speed limit, or was operated at such a speed as to endanger life, limb and property, and that the injury to the plaintiff would not have occurred except for the excessive speed of the bus: *Held*, the violation of the legal speed limit is negligence, and not merely evidence of negligence, and when the proximate

cause of the injury is actionable, and the coach line may not escape liability therefor on the ground that the car with which the bus collided was also negligently driven, and a judgment as of nonsuit is properly denied.

APPEAL by defendant from *Sink, Special Judge,* at May Term, 1929, of MECKLENBURG. No error.

This is an action for the recovery of damages for personal injury alleged to have been caused by the defendant's negligence in operating its bus at the time of its collision with an automobile driven by J. W. Register. The defense was the alleged sole negligence of Register. The jury answered the two issues submitted in favor of the plaintiff, who was given a judgment upon the verdict. The defendant excepted and appealed.

D. E. Henderson and Stancill & Davis for plaintiff.
John W. Hester for defendant.

ADAMS, J. The defendant's motion for nonsuit raises the question whether there is sufficient evidence to support the verdict, for it must be conceded that the defendant's contentions, if accepted by the jury, would have warranted a verdict against the plaintiff.

The collision occurred on 30 March, 1928, between Newton and Conover, the bus moving to the west and Register's car to the east. The plaintiff, a passenger on the bus, occupied the second seat behind the driver. According to his testimony the highway was eighteen or twenty feet wide and was straight for half a mile. A quarter of a mile in front of the bus the approaching car was seen to be running from one side of the road to the other; and the plaintiff called this to the driver's attention. When first seen it was on the wrong side of the road; it passed two or three times to the right and two or three times to the left. Again it went to the right and finally to the left; and soon thereafter the collision occurred. A few seconds before the impact the bus was moving at a rate in excess of fifty-five miles an hour, and at the moment of the clash, which took place near the center of the road, the car was turning to its right and the bus to its left.

The driver of the bus testified that its speed was about thirty-five miles an hour; that he could have stopped the bus within forty feet; that Register, when about eighty feet distant from the bus, turned again to the wrong side of the road and stayed there; and that the bus then slowed down to twenty or twenty-five miles an hour.

In these circumstances we cannot hold as a matter of law that there was no evidence of negligence on the part of the defendant. It is provided by statute that no person shall drive a vehicle on a highway at a greater

rate of speed than forty-five miles an hour, or at such a speed as to endanger the life, limb, or property of any person. Not only is it made prima facie unlawful for any person to exceed the speed limit; the violation of any of these provisions is made a misdemeanor. C. S., 2621 (46), 2621 (100).

The failure, without legal excuse, to obey the provisions of a statute is negligence, and such negligence when the proximate cause of an injury is actionable. *Ledbetter v. English,* 166 N. C., 125; *Clark v. Wright,* 167 N. C., 646. Whether the negligence complained of is the proximate cause of the injury suffered is ordinarily a question for the jury. *Byrd v. Express Co.,* 139 N. C., 273; *Saunders v. R. R.,* 167 N. C., 375; *Lea v. Utilities Co.,* 175 N. C., 459; *Ridge v. High Point,* 176 N. C., 421.

It was the contention of the plaintiff that the defendant disregarded two express inhibitions of the statute in driving fifty-five miles an hour and at such speed as to endanger life, limb, and property; that the car was light and the weight of the bus was 9,000 pounds; and that if the bus had been stopped before the collision, as it could have been, or its speed had been materially reduced, the injury would probably have been averted.

These contentions were submitted to the jury under instructions which are free from error. The defendant's position that a breach of the provisions above set forth is only evidence of negligence is distinctly disapproved in *Ledbetter v. English, supra.*

The instruction which is pointed out in the fourth exception is not unfavorable to the appellant; at any rate we find nothing in it of which the appellant can justly complain.

No error.

SAMMAX INVESTMENT COMPANY v. M. K. ZINDEL AND ZINDEL BAKING COMPANY.

(Filed 18 December, 1929.)

Frauds, Statute of, B a—A lease for three years to take effect in the future comes within the provisions of the Statute.

Where the owner of land agrees to erect a certain kind of building thereon for a proposed lessee, and makes a parol lease for the rental of the property for three years to take effect upon the completion of the building: *Held,* the lease for three years to take effect in the future comes within the provisions of the Statute of Frauds, and where in an action thereon the lessee denies the contract of lease and pleads the statute, he may not be held liable unless it was executed in writing, or some memorandum thereof made and signed by the party to be charged therewith or by some other person by him duly authorized.

APPEAL by defendants from *Johnson, Special Judge,* at June Special Term, 1929, of BUNCOMBE.

Civil action to recover damages for an alleged breach of a rental contract.

Plaintiff alleges that on 15 April, 1928, the defendants verbally agreed to lease a bakery and baking shop, to be built by the plaintiff at Black Mountain, N. C., said lease to be "for a term of three years, at a monthly rental of $100, payable in advance, the defendants agreeing to take possession of said building upon its completion"; that though completed and possession tendered 1 July, 1928, the defendants failed to take possession of said premises; and that rent has accrued since said completion and tender, none of which has been paid; wherefore plaintiff brings this action 5 September, 1928, to recover rent for three months, July, August and September, 1928, and demands in addition thereto damages for the breach of said rental contract.

The defendants denied that any contract or lease of any nature whatsoever existed between the parties; and, upon the issues thus joined, there was a verdict and judgment for the plaintiff, from which the defendants appeal, assigning errors.

Weaver & Patla for plaintiff.
J. L. Deadwyler for defendants.

STACY, C. J. The lease of the building resting, as it does, in parol and being for a term of three years, to commence in the future, and not from the making of the contract, is void under our statute of frauds. *Mauney v. Norvell,* 179 N. C., 628, 103 S. E., 372.

It is provided by C. S., 988, that all leases and contracts for leasing lands "exceeding in duration three years from the making thereof," shall be void, unless said leases or contracts, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized. Thus it would seem that a parol lease of lands for the full term of three years, to take effect in the future, and not from the making of the contract, necessarily falls within the purview of the statute, or else such a lease would be valid no matter at what time in the future it took effect, and if one such lease could be made, a succession of them might be made, and the protection of the statute would thus be lost, so far as purchasers and others are concerned. This was the holding in *Mauney's case, supra.*

The defendants having denied the lease as alleged, or that any contract whatsoever existed between the parties, were entitled to the benefit of the statute, and it was error to deny them this right. *Henry v. Hilliard,* 155 N. C., 372, 71 S. E., 439.

New trial.

CHAPMAN-HUNT COMPANY, INC., v. HAYWOOD COUNTY BOARD OF EDUCATION.

(Filed 18 December, 1929.)

1. Schools and School Districts C d—Issue of acceptance of school building by county superintendent should be submitted in action on contract for construction.

Where the county board of education is sued by a contractor for balance due under contract for the construction of a school building, it is required by C. S., 5415, that the building be inspected, received and approved by the county superintendent of public instruction, and when it appears that the jury has not had an appropriate issue on this question submitted to them a new trial will be granted so that this fact may be determined.

2. Trial F a—Issues should establish facts sufficient for rendition of judgment.

Issues submitted to the jury and their answers thereto should establish facts sufficient to enable the court to proceed to judgment.

APPEAL by defendant from *Grady, J.*, at August Special Term, 1929, of HAYWOOD.

Civil action to recover the balance alleged to be due on a building contract.

Plaintiff alleges that on 21 April, 1924, it entered into a contract with the defendant whereby it agreed to erect a new school building and gymnasium at Waynesville, N. C., for the sum of $73,000; that said buildings have been completed, according to plans and specifications furnished by the architect, inspected and approved by the architect, and accepted by the defendant, and that a balance of $900 remains unpaid on said work.

Upon denial of liability, and issues joined, the jury returned the following verdict:

"1. Was the school building in question inspected, approved and received by the architect in charge, as alleged in the complaint? Answer: Yes.

"2. What amount, if anything, is the plaintiff entitled to recover of the defendant? Answer: $900, with interest."

From a judgment on the verdict in favor of the plaintiff, with the following clause inserted therein, "It was admitted that the county superintendent did not inspect, receive and approve said schoolhouse, as provided by section 5468, N. C. Code of 1927," the defendant appeals, assigning errors.

T. Lanier and J. W. Ferguson for plaintiff.

T. A. Clark and Alley & Alley for defendant.

STACY, C. J. Plaintiff alleges that the buildings in question have been completed and accepted by the defendant. This is denied. It is provided by C. S., 5415, among other things, that all new school buildings "shall be inspected, received and approved by the county superintendent of public instruction before full payment is made therefor." The issues submitted to the jury, therefore, are insufficient to support the judgment, as they are not determinative of the controversy. The crucial fact of liability is yet undecided. For this reason, a new trial must be awarded. *Bank v. Broom Co.,* 188 N. C., 508, 125 S. E., 12; *Holler v. Tel. Co.,* 149 N. C., 336, 63 S. E., 92; *Strauss v. Wilmington,* 129 N. C., 99, 39 S. E., 772; *Tucker v. Satterthwaite,* 120 N. C., 118, 27 S. E., 45.

A verdict, whether upon one or many issues, should establish facts sufficient to enable the court to proceed to judgment. *McAdoo v. R. R.,* 105 N. C., 140, 11 S. E., 316; *Emery v. R. R.,* 102 N. C., 209, 9 S. E., 139.

New trial.

W. H. WESTALL v. ATLAS SUPPLY COMPANY, INC.

(Filed 18 December, 1929.)

Landlord and Tenant D e—Acceptance of surrender of leased premises should have been determined by jury in this case.

Under the evidence tending to show that a lessee of a store tendered the keys to the lessor, who refused them, and later mailed the keys to the lessor with a letter to the effect that the lessee had given up the leased premises and hoped the lessor would then accept the keys, and the lessor kept the keys without further comment or communication: *Held,* the question of whether the lessor had accepted the surrender of the leased premises is determinable by the jury alone, and an instruction that the lessor might recover as a matter of law for the unexpired term of the lease less any sum he might have realized by the exercise of ordinary diligence in leasing or renting the property to others, is error entitling the defendant to a new trial.

APPEAL by defendant from *Johnson, Special Judge,* at October Special Term, 1929, of BUNCOMBE.

Civil action to recover damages for breach of a rental contract.

Plaintiff's building, located on Spruce Street in the city of Asheville, was leased to Whitman-Douglas Company for $150 per month, which lease expired 31 October, 1927. On 12 February, 1927, the defendant took from Whitman-Douglas Company an assignment of the unexpired term of the lease, and procured the following consent and agreement from the plaintiff:

"I hereby consent to the aforegoing assignment of lease and hereby release the said Whitman-Douglas Company from any obligation arising out of said lease between the dates of 1 March, 1927, and the termination of the said lease, and hereby agree to execute a lease to the Atlas Supply Company running from the termination of the Whitman-Douglas lease to 1 January, 1929, the terms of the said lease to be three hundred dollars per month payable in the same manner as prescribed in the Whitman-Douglas lease herein mentioned.

W. H. WESTALL.

Accepted by:
Atlas Supply Company, Inc.,
E. T. NANCE."

The defendant thereupon went into possession of the premises, and paid to the plaintiff the stipulated rent of $150 per month accruing under the Whitman-Douglas lease up to the date of its expiration.

Without further negotiations between the parties, the defendant remained in possession and paid to the plaintiff for the months of November, December, 1927, and January, 1928, the increased rental of $300 per month.

On 1 February, 1928, the defendant vacated the premises, and through its agent offered the keys to the plaintiff, which he refused to accept. Later, on 9 February, 1928, the defendant mailed to plaintiff the keys to said building, accompanied by the following letter:

"We are enclosing herewith the keys to the building which we formerly had rented from you in Asheville. As we wrote you a week or so ago, we have given up this building and are therefore discontinuing the rent.

"Our Mr. Northup advises that he offered you these keys, and you would not accept them, and we trust that they will be accepted at this time."

On 30 March, 1929, plaintiff instituted this action to recover for eleven months rent at $300 per month from 1 February, 1928, to 1 January, 1929.

From a verdict and judgment in favor of plaintiff for the full amount demanded, the defendant appeals, assigning errors.

Merrimon, Adams & Adams for plaintiff.
Joseph W. Little and W. T. Wilson for defendant.

STACY, C. J., after stating the case: The trial court held, as a matter of law, that the plaintiff was entitled to recover the balance due under the contract, *i. e.*, $300 per month for eleven months, "less any sum that the plaintiff might have realized by the exercise of ordinary diligence in

renting or leasing the property to some one else." *Monger v. Lutterloh*, 195 N. C., 274, 142 S. E., 12. In this, we think there was error.

As to whether there was a surrender and acceptance of the tenement when the plaintiff received the keys through the mails, accompanied by defendant's letter of 9 February, 1928, and kept them without further comment, is a question presented by the evidence, determinable alone by the jury. 16 R. C. L., 1154; Note, 18 A. L. R., 957.

New trial.

C. H. B. LEONARD, COUNTY MANAGER AND ACCOUNTANT FOR DAVIDSON COUNTY, AND DAVIDSON COUNTY BY THE BOARD OF COUNTY COMMISSIONERS, C. M. HOOVER, CHAIRMAN; L. W. DELAPP, C. A. HOOVER, M. R. HARRIS AND R. S. OWEN, v. FRED C. SINK, SHERIFF OF DAVIDSON COUNTY (ORIGINAL DEFENDANT), AND THE CITY OF LEXINGTON, CITY OF THOMASVILLE, AND THE TOWN OF DENTON (LATER MADE PARTIES DEFENDANT).

(Filed 18 December, 1929.)

1. Statutes C b—Repeal of statute by implication is not favored.

A later act of the Legislature will not be construed to repeal a former act thereof by implication where, construing the two *in pari materia*, there is no repugnancy between the two, and when repugnant in part, then only to the extent of those parts that are clearly repugnant when construed with the view to make them reconcilable by reasonable interpretation.

2. Counties E d—Statute giving municipalities of Davidson control of part of road funds not repealed by later act in respect thereto.

Where by authority of statute a board of road commissioners for a county has been created with full charge of the roads of a county and by later act the sheriff of the county is directed to pay to the cities and towns of the county fifty per cent of all taxes levied and collected for road purposes in such towns, to be held by their respective treasurers and expended upon their own streets and roads, and by a later act the board of county road commissioners is abolished and their duties fixed upon the county commissioners, with provision that "all taxes and other funds applicable to the roads of the county that may be collected in the future shall be deposited with the county treasurer": *Held*, construing the various acts *in pari materia*, there is no repugnancy between the act abolishing the county road commissioners and the act providing that the municipalities receive a part of the revenue for road purposes, and it is the duty of the county treasurer to pay to the municipalities the fifty per cent of such revenue according to the terms of the statute.

3. Taxation A c—Where tax levy is uniform and ad valorem objection to expenditure under valid legislative authority is untenable.

Where the tax of a county upon its property for road purposes is uniform and *ad valorem*, Art. V, sec. 3; Art. VII, sec. 9, an act that segregates

fifty per cent of such taxes collected from the cities and towns of the county to be repaid to them and used by them for street purposes, limiting their expenditure therefor to the amount so received, is not in contravention to the organic law, the municipalities being local agencies of the State for such purposes and the distribution of the funds being reasonable and within the legislative discretion with which the courts will not interfere.

4. Statutes A e—Statutes will not be held unconstitutional unless clearly so.

An act of the General Assembly will not be held unconstitutional unless clearly so.

STACY, C. J., dissents.

APPEAL by defendants from *Clement, J.,* at Chambers, in Winston-Salem, 11 April, 1928, from DAVIDSON County. Reversed.

This is an application for writ of mandamus, under C. S., 866, brought by plaintiffs against defendant Fred C. Sink, sheriff of Davidson County.

The court below found the following allegations in the complaint to be true:

"1. That C. H. B. Leonard is the duly elected county manager and county accountant for Davidson County with such powers and duties as are prescribed for county managers as set forth in chapter 91 of the Public Laws of North Carolina of 1927.

2. That C. M. Hoover is chairman, L. W. DeLapp, C. A. Hoover, M. R. Harris and R. S. Owen are the duly elected board of commissioners of Davidson County, and as such has the powers and duties as conferred upon county commissioners as set forth in Article 2, chapter 24 of the Consolidated Statutes of North Carolina.

3. That Fred C. Sink is the duly elected sheriff of Davidson County and as such has the duty of collecting the taxes and paying the same to the county treasurer.

4. That under chapter 246 of the Public-Local Laws of North Carolina of 1919 the sheriff of Davidson County was required under section 1 to perform certain duties, which section is in words and figures as follows: 'Section 1. That the sheriff of Davidson County shall turn over and pay to the governing bodies of any incorporated cities or towns in Davidson County fifty per cent of all taxes levied and collected for road purposes from the property and polls within such incorporated cities and towns respectively.' That under and by virtue of said act, among other things it was directed that the amount so collected should be paid to the treasurer of the said incorporated cities and towns in Davidson County.

5. That Public-Local Laws of North Carolina of 1925, chapter 299, was duly passed by said Legislature, and among other things and specifically section 6 of said act provides in words and figures as follows: 'Sec. 6. That all sums of money paid to the board of county commis-

sioners by the board of road commissioners on and after 31 March, 1925, and all taxes and all other funds applicable to the road fund of Davidson County that may be collected in the future, shall be deposited with the county treasurer, which fund shall be handled in the same manner and form provided for other county funds: *Provided,* that all funds collected for road purposes shall be kept separate and apart from the county funds.' That section 7 of said act provides in part that the said board of county commissioners shall use the funds arising from taxation and from every source to construct, improve and maintain the public highways of said county.

That the entire chapter 299 of the Public-Local Laws of North Carolina of 1925 is hereby pleaded in this action in as full and ample manner as if the same were written herein.

6. That on 21 March, 1929, C. H. B. Leonard, county manager and county accountant, under and by virtue of his duties as set forth in chapter 91 of the Public Laws of North Carolina of 1927, and for the county commissioners of Davidson County, addressed the following letter to Fred C. Sink, sheriff of Davidson County:

'MR. FRED C. SINK,
Sheriff of Davidson County,
Lexington, N. C.

SIR: Please advise me whether or not you are going to continue to pay into the county treasury, as you have been doing, all the funds collected for road purposes in this county.

Yours very truly,
C. H. B. LEONARD,
County Manager and County Accountant.'

That on the same day as above set forth, C. H. B. Leonard, as county manager and county accountant, received the following reply from Fred C. Sink, sheriff of Davidson County:

'MR. C. H. B. LEONARD,
County Manager and Accountant.

DEAR SIR: Replying to the above, beg to advise that I am not going to continue to pay all funds collected for road purposes into the county treasury.

Yours very truly,
FRED C. SINK, *Sheriff.*'"

The court below further found: "That the defendant Fred C. Sink, sheriff of Davidson County, as admitted in the answers, is now keeping in his possession 50% of the said road funds collected in the said cities and towns for the use and benefit of said cities and towns respectively,

and to be paid over to their respective treasurers, and has refused to pay the same over to the treasurer of Davidson County as provided in chapter 299, Public-Local Laws of North Carolina, 1925."

The court below rendered the following judgment: "It is hereby ordered, adjudged and decreed that the defendant, Fred C. Sink, sheriff of Davidson County, be and he is hereby ordered and directed by this court to pay and turn over to the treasurer of Davidson County all taxes and funds applicable and belonging to the road funds of Davidson County, which he has collected or may in the future collect, and specifically including any and all taxes and funds in dispute in this action, and that the plaintiff recover their costs expended in this action to be taxed by the clerk."

The city of Lexington, city of Thomasville and town of Denton have not received 50% of the tax collected out of their respective municipalities for street improvement, and were made parties to the action.

The defendants excepted, assigned error and appealed to the Supreme Court.

Walser & Walser, Spruill & Olive for plaintiffs.
Raper & Raper, H. R. Kyser and Phillips & Bower for defendants.

CLARKSON, J. For a decision of this controversy, we have to consider the local road law applicable to Davidson County:

(1) The first local law of county-wide application is chapter 334, Public-Local Laws, 1915. This act created "The Board of Road Commissioners of Davidson County," and invested it with all the powers, rights and authority which was theretofore exercised and vested in the board of county commissioners of Davidson County. A general supervision and control was given the road commissioners to construct, repair and maintain the roads of the county. Authority was given to issue $300,000 of bonds. The act was a comprehensive system to construct, improve and maintain the roads of the county and a tax for this purpose to be levied each year of not more than 30 cents on the $100 valuation of real and personal property and not exceeding 90 cents on the poll, and a treasurer was to be designated by the act to handle the road funds. Under section 19 of this act, provision is made to distribute the work of improving and constructing the highways of the county in each township as equitably as practicable, having due regard to taxable property in each township. In section 24 it is provided that the road taxes shall be expended in such a way and at such times according to the needs of the roads in each township. This law was amended and additional power given, and the act made more complete, chapter 50, Public-Local Laws, 1917. Then again, Public-Local Laws, 1917, ch. 129, sec. 4, reads:

"That the board of road commissioners may work any necessary road through any incorporated towns of the county necessary to connect the main highways in the county," etc.

Chapter 233, Public-Local Laws 1919, part section 1, "And in addition to the taxes now authorized to be levied under existing laws," increased the tax 30 cents, making 60 cents on the $100 valuation, $1.80 on poll.

Chapter 246, Public-Local Laws, 1919, sec. 1: "That the sheriff of Davidson shall turn over, and pay to the governing boards of any incorporated cities or towns in Davidson County fifty per cent (50%) of all taxes levied and collected for road purposes from the property and polls within such incorporated cities or towns respectively.

Sec. 2. That the amounts so collected and paid to the governing boards of such cities and towns shall be paid to the treasurer of the same, and shall be a separate fund to be used for building and improving and maintaining the streets, of such towns and cities, or at the discretion of the governing bodies, every such cities and towns to pay interest of bonds issued for permanent streets of said cities and towns respectively.

Sec. 3. That the board of road commissioners of Davidson County shall not have authority or power to expend any further portion of the road funds of the county for work in said cities or towns."

Chapter 117, Public-Local Laws, 1923, provides that the tax to be levied shall not exceed 35 cents on the $100 valuation of taxable property. The tax was reduced from 60 cents to 35 cents.

Chapter 299, Public-Local Laws, 1925, the caption is as follows: "An act to provide for the construction and maintenance of roads and bridges in Davidson County." Sec. 2. "That it shall be the duty of the said board to take charge of the working, maintaining, altering and constructing of any and all roads and bridges in Davidson County now maintained by the county as public roads, and it is hereby vested with all powers, rights and authority now vested in the board of road commissioners of Davidson County for the general supervision of roads of said county and for the construction and repairing thereof." Sec. 6. "That all sums of money paid to the board of county commissioners by the board of road commissioners on and after the thirty-first day of March, one thousand nine hundred and twenty-five, *and all taxes and all other funds applicable to the road funds of Davidson County, that may be collected in the future, shall be deposited with the county treasurer,* which fund shall be handled in the same manner and form provided for other county funds: *Provided,* that all funds collected for road purposes shall be kept separate and apart from other county funds." Sec. 23. "That all laws and clauses of laws in conflict with this act are hereby repealed."

The *first* question involved in this controversy: Are the provisions of chapter 246 of the Public-Local Laws of 1919 in direct and irreconcilable conflict with the provisions of chapter 299, Public-Local Laws of 1925? We think not.

In 25 R. C. L. (statutes), part sec. 169, p. 918-19, we find the following: "Repeals by implication are not favored, and will not be indulged if there is any other reasonable construction. The presumption is always against the intention to repeal where express terms are not used, and the implication, in order to be operative, must be necessary. A law is not repealed by a later enactment, if the provisions of the two laws are not irreconcilable nor necessarily inconsistent, but both may stand and be operative without repugnance to each other. Nor can one act be allowed to defeat another if, by a fair and reasonable construction, the two can be made to stand together. Although two acts are seemingly contradictory or repugnant, they are, if possible by a fair and reasonable interpretation, to be given such a construction that both may have effect. If a later act not repugnant to the earlier and containing no negative words is not clearly intended to cover the whole ground of the earlier, there is no implied repeal." *S. v. Perkins,* 141 N. C., 797; *S. v. Foster,* 185 N. C., at p. 677; *Car. Discount Corp. v. Landis Motor Co.,* 190 N. C., 157; *City of Greensboro v. Guilford County,* 191 N. C., 584; *Litchfield v. Roper,* 192 N. C., 202; *Winston-Salem v. Ashby,* 194 N. C., 388; *Lumber Co. v. Welch,* 197 N. C., 249; 25 R. C. L., sec. 173 (statutes), p. 923.

It is said in *S. v. Kelly,* 186 N. C., 372: "Where two statutes are thus in conflict and cannot reasonably be reconciled, the latter one repeals the one of earlier date to the extent of repugnance. *Commissioners v. Henderson,* 163 N. C., 120; *Commissioners v. Commissioners,* 186 N. C., 202. 'Between the two acts there must be plain, unavoidable and irreconcilable repugnance, and even then the old law is repealed by implication only *pro tanta* to the extent of the repugnancy.' 36 C. L. P., 1074. Every affirmative statute is a repeal by implication of a prior affirmative statute, so far as it is contrary to it, for the maxim is *Leges posteriores priores contrareas abrogant* (later laws abrogate prior laws that are contrary to them). *S. v. Woodside,* 31 N. C., 500." *Carr v. Little,* 188 N. C., at p. 111.

Under the above well settled law in this jurisdiction, as to the interpretation of statutes, it cannot be said that there is a direct, irreconcilable conflict in the acts when construed *in pari materia,* taking into consideration the intent and object of the acts.

The history of road building in Davidson County in recent years is an interesting one. Great elasticity is given for local self-government in matters of this kind under our Constitution. In Davidson County we

first have a large bond issue of $300,000, in 1915, and a tax of 30 cents on the $100 valuation of property and 90 cents on the poll. The board of county commissioners had theretofore controlled the road system, but to expend so large a sum of money the authority was turned over to the board of road commissioners. Under the act a treasurer was to be designated to handle the road funds. In 1917 this act was amended and further power given, including the power to work the roads of any incorporated town that connects with the main highways of the county. In 1919 the tax was doubled to 60 cents on the $100 valuation of property and $1.80 on the poll.

In 1919 the sheriff, who collected the road tax in the county, and also from the incorporated cities and towns of the county, instead of turning what was collected from the cities and towns over to the treasurer of the board of road commissioners, to be expended by it under the act, turned 50% collected over to the incorporated cities and towns for the purpose of street improvement and maintenance and to pay interest on bonds for permanent streets, and the balance 50% to the board of road commissioners. Under the act the board of road commissioners could spend no more of the county road funds in the cities and towns. In 1923 the road tax was reduced to 35 cents on the $100 valuation of property.

After trying out the board of road commissioners for ten years, in 1925 it was abolished and the road system was put back in the hands of the board of county commissioners. There is nothing in the act of 1925 that by direct language or clear implication repeals the act of 1919, by which the sheriff turned over 50% of the taxes collected by him from the cities and towns back to the cities and towns for street improvement, etc. The tax was collected by the sheriff from these municipalities under the former acts which tax was reduced in 1923 to 35 cents on the $100 valuation of property. Nothing whatever is said in the act of 1925 in regard to any duty of the board of county commissioners, when taking over the road system of the county, in reference to incorporated cities and towns in Davidson County as set forth in other acts when the road system was under the board of road commissioners.

Again, there is no provision in the act of 1925 for the levying of any taxes whatever. The levying of the taxes, the limit upon the levy and the amount to be levied was not affected in any manner by any provision in this act.

We must bear in mind that the sheriff, as he collected the road tax from the cities and towns, under the act of 1919, turned back 50% to the municipalities and the balance over to the board of road commissioners. Then the act of 1925 was passed. Sec. 6, *supra,* says: *"And all taxes and all other funds applicable to the road funds of Davidson County that may be collected in the future shall be deposited with the county treas-*

urer," etc. *All taxes* consisted solely of the 35 cents on $100 valuation of property and the poll tax. So *all other funds applicable to the road funds of Davidson County,* to give meaning to these words, would indicate that reference was had to those funds collected from the cities and towns in the county. Fifty per cent of these funds came into the hands of the sheriff that he theretofore collected from the cities and towns and paid to the board of road commissioners, and therefore were the other funds applicable to the road funds of Davidson County to be paid to its successor, the board of county commissioners—it by the act becoming the road-governing body of the county, and the act named the county treasurer the depository. The act of 1919 had by clear and explicit language segregated 50% of the tax collected in the municipalities in the county to the needs of its streets and the other 50% was applicable to the road funds of Davidson County for the general road needs of the county. There is no plain, direct or irreconcilable repugnancy in the acts. In so important change, involving the municipalities of the county, it would be a hardship to read into the act of 1925 something that the draftsmen could have easily put in it, but did not, and now take this 50% of tax collected from and segregated to the municipalities for street purposes, and put it into the general road fund of the county. In the absence of express words or clear implication, we cannot hold that these segregated funds to the municipalities should go into the general road fund of the county. The main object and intent of the act of 1925 it seems was to get rid of the board of road commissioners and put the county road system back into the hands of the board of county commissioners.

Again, the act of 1919 provides that this segregated fund could be used to pay interest on bonds for permanent street improvements. We do not know from the record if this segregated fund was so used or not, but it is mentioned to indicate how unwise it would be to allow such ambiguous language to repeal a fixed status.

The act of 1925 repeals all laws and clauses of laws in conflict. The acts of 1919 and 1925 can be construed together and reconciled, with no conflict.

The *second* question involved: Is chapter 246, Public-Local Laws of 1919, unconstitutional? This act permits 50% collected from the municipalities for road purposes to be turned back and segregated for street purposes in the municipalities. We cannot so hold.

The plaintiffs contend that the act is unconstitutional and void. We can see no unreasonableness in the act. The tax is uniform and *ad valorem.* Const. of N. C., Art. V, sec. 3; Art. VII, sec. 9. The act of 1925 does not change the amount levied, 35 cents on the $100 of property under the 1923 act, 50% collected from the municipalities is segregated under the 1919 act to the municipalities for street purposes, the

balance is put into the general road fund for county road purposes. The tax levied is uniform and *ad valorem,* and discretionary legislative distribution is reasonable.

It is said in *Lassiter v. Commissioners,* 188 N. C., at p. 382-3, citing numerous authorities: "These municipal boards, as we have uniformly held, are, in matters governmental, mere agencies of the State for the convenience of local administration in designated portions of the State territory; and in the exercise of their ordinary governmental function they are subject to almost unlimited legislative control, except when restrained by constitutional provisions. Under the Highway Act, it was perfectly competent, therefore, for the Legislature to authorize, as they have done, the acquisition of these roads, and by the same token the county board is allowed to contract with them for its purchase, maintenance and upkeep of the road for which they were then responsible. Granted the power it is fully established that its discretionary exercise is for the commissioners, and the courts are not permitted to interfere unless their action is so unreasonable as to amount to an oppressive and manifest abuse."

In matters of this kind the road-governing bodies, under legislative authority, have exercised discretion and only held for abuse of discretion. They are the creatures of the General Assembly but in the present act the General Assembly, the creator, had itself segregated the fund to the municipalities. It has been often held that an act of the General Assembly will not be held unconstitutional unless clearly so.

In *Queen v. Commissioners of Haywood,* 193 N. C., at p. 823, we find, " 'If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.' *Sutton v. Phillips,* 116 N. C., at p. 504; *Hinton v. State Treasurer, ante,* at p. 499." *S. v. Revis,* 193 N. C., 192; 50 A. L. R., 98; *Board of Commissioners of McDowell County v. Assell,* 194 N. C., 412.

In *Cabe v. Board of Aldermen,* 185 N. C., at p. 160, citing numerous authorities, it is held: "The decisions of this State have repeatedly recognized and approved the principle that counties, townships, and other like municipal corporations, and to a large extent cities and towns, are simply agencies of the State constituted for the convenience of local administration in certain portions of the State's territory, and that in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, the position extending to the imposition and expenditure of taxes raised for ordinary governmental purposes, and where not affected by special constitutional provisions." See *Ellis v. Greene,* 191 N. C., at p. 765.

In *Clark v. Sheldon,* 106 N. Y., 104, an act was held constitutional "directing and providing for the application of taxes assessed upon any

railroad in a town, city or village towards the redemption of bonds issued by the municipality to aid in the construction of such railroad," and pointed out that this did not impose a tax upon property in other portions of the county for the benefit of any township, city or town, but simply appropriated the taxation upon such railroad for the benefit of the municipality which had incurred a burden to procure the building of such railroad. The same view is upheld in *Commissioners v. Lucas,* 93 U. S., 108. *Jones v. Commissioners,* 143 N. C., 59. See *Board of Trustees v. Webb,* 155 N. C., 379; *Commissioners v. Commissioners,* 157 N. C., 514; *Woodall v. Highway Commission,* 176 N. C., 377. An interesting discussion, where the tax is not uniform and *ad valorem,* is found in *Anderson v. Asheville,* 194 N. C., 117. For the reasons given, the judgment below is

Reversed.

STACY, C. J., dissents.

WILLIE E. PASS v. McCLAREN RUBBER COMPANY.

(Filed 18 December, 1929.)

1. Torts C b—In this case held: evidence of fraud in procurement of release was insufficient to be submitted to jury.

Where upon a material consideration an injured employee had signed a release of all claims he might have as a result of the injury, in order to set it aside in an action for damages subsequently brought it must be shown that the release was obtained by fraud; and where the evidence tends only to show that the plaintiff executed the release upon the advice of an attorney he had employed for the purpose, and that the representations relied on were only the opinion of the defendant's physician who attended the plaintiff, that the injury was not permanent, without evidence that the opinion was made in bad faith, and that through later developments it was discovered that the injury was permanent, the evidence of fraud is insufficient to be submitted to the jury, and the plaintiff's motion as of nonsuit should have been allowed.

2. Same—Consideration for release as evidence of fraud in its procurement.

The amount of consideration paid for a release from liability for a negligent injury, to be evidence of fraud in the procurement of the release, must be so grossly inadequate as to compel the conclusion that it was practically nothing, and where it is the payment of five hundred dollars for an injury to an arm with expense of treatment, etc., the fact that the jury had awarded damages in the sum of two thousand dollars will not be held sufficient evidence of fraud in the procurement of the release under the facts of this case.

APPEAL by defendant from *Sink, Special Judge,* at May Special Term, 1929, of MECKLENBURG. Reversed.

Action to recover damages for personal injury sustained by plaintiff, while engaged in work as an employee of defendant.

In response to issues submitted by the court, the jury found that plaintiff was injured by the negligence of defendant as alleged in the complaint; that plaintiff did not by his own negligence contribute to his injury as alleged in the answer, and that plaintiff did not assume the risk of his injury, when he contracted with defendant for his employment, as alleged in the answer.

In bar of plaintiff's recovery, in this action, defendant set out in its answer, and relied upon a release in writing, executed by the plaintiff, prior to the commencement of this action, upon the payment to him by the defendant of the sum of $500, of any and all causes of action which plaintiff had against the defendant, at the date of the release, or which he might have thereafter, by reason of his injury.

Plaintiff admitted the execution by him of the release set out in the answer, and the payment to him by defendant of the sum of $500, as the consideration for said release. For the purpose of avoiding said release, plaintiff alleged in his reply that he was induced to execute the same by the false representations of the physician employed by defendant, who operated on his injured arm, "that said arm had sustained an ordinary break, and that the operation which had been performed on said arm by said physician, was successful, that said arm was then on the road to complete recovery, and that plaintiff would be able to perform his usual physical labors within the course of eight or ten weeks from the date of the injury."

In response to issues submitted by the court the jury found that the release was procured by fraud, or misrepresentation as alleged in the reply of plaintiff, and that plaintiff is entitled to recover of defendant as damages resulting from his injury the sum of $2,000.

From judgment on the verdict that plaintiff recover of the defendant the sum of two thousand dollars, defendant appealed to the Supreme Court.

G. T. Carswell and Joe W. Ervin for plaintiff.
C. H. Gover for defendant.

CONNOR, J. Plaintiff, who is about 22 years of age, was injured while at work for defendant, at a fabric machine, on 11 April, 1928. He was taken immediately after his injury to a hospital, where his injured arm was treated by Dr. Hipp, a physician, who was employed for that purpose by the defendant. Plaintiff remained in the hospital, under

the professional care of Dr. Hipp, from 11 April to 24 April, 1928. Dr. Hipp, in response to plaintiff's inquiry, told him that his injury was not permanent; that his arm would be all right within eight or ten weeks—well enough for plaintiff to return to his work.

After plaintiff was discharged from the hospital, but while he was still under the professional care of Dr. Hipp, he entered into negotiations with the attorney of defendant for the settlement of his claim for damages. Plaintiff declined to accept the sum offered by said attorney and employed an attorney at law, as his counsel to advise him with respect to the settlement of his claim against defendant. He made a full statement to his counsel of the circumstances under which he was injured and also as to the extent of his injury. He told his counsel that he had been advised by Dr. Hipp that his injury was not permanent and that his arm would be well enough within eight or ten weeks for him to return to his work. As a result of further negotiations between plaintiff and his counsel, and the attorney for defendant, it was agreed that defendant should pay to plaintiff, in full settlement of his claim for damages the sum of $500, and that plaintiff should execute the release, which was read to plaintiff by his counsel. During these negotiations the attorney for the defendant showed to plaintiff and his counsel a letter from Dr. Hipp to the defendant, in which Dr. Hipp advised defendant that plaintiff's injury was not permanent, and that plaintiff would be able to return to his work within eight or ten weeks from the date of the injury. Plaintiff and his counsel relied upon the opinion of Dr. Hipp, expressed both to plaintiff and to defendant, as to the extent of plaintiff's injury. On 4 May, 1928, in the presence of his counsel, and upon his advice, plaintiff executed the release set out in defendant's answer, and accepted from defendant the sum of $500, as the consideration for said release.

After the execution of the release by plaintiff, and prior to the commencement of this action, it developed that plaintiff's injury is permanent; he was not able, because of his injury, to return to his former work, or to do work equally as remunerative as his former work, at the expiration of ten weeks from the date of his injury. The bones in plaintiff's broken arm made a good union, but there was a nerve involvement which, notwithstanding several operations on plaintiff's arm, has rendered his arm practically useless to him. None of the operations was successful. Plaintiff's surgeon, as a witness in his behalf, expressed the opinion that no treatment, surgical or otherwise, could restore his arm to its former strength; that his injury is permanent. The jury found from evidence, to which there was no objection, and under instructions of the court, to which there was no exception, that plaintiff has sustained damages, as the result of his injury, in the sum of $2,000. The only question presented for decision by defendant's motion, at the close of the

evidence, for judgment as of nonsuit, was whether there was evidence tending to show that the release executed by plaintiff was procured under circumstances which render said release ineffectual as a bar to plaintiff's recovery of damages in this action. The defendant assigns as error upon its appeal to this Court the refusal of the court to allow its motion.

There was no evidence tending to sustain the contention of plaintiff that the release was procured by fraud. It is doubtful whether there are allegations in the complaint sufficient to raise an issue of fraud in the procurement of the release. But conceding that the facts alleged in the complaint are sufficient to raise such issue, we are of the opinion, and so decide, that there was a want of evidence tending to show that the release was procured by fraud. The evidence shows that the negotiations for a settlement of his claim against the defendant for damages, were begun after the plaintiff had left the hospital, and that these negotiations were initiated by the plaintiff, and not by the defendant. The facts in this case, as shown by all the evidence, with respect to the circumstances surrounding plaintiff, at the time the settlement was made and the release signed, differentiate this case from *Butler v. Fertilizer Works,* 193 N. C., 632, 137 S. E., 813. In that case the negotiations for a settlement of the injured employee's claim for damages against the defendant, were begun by its agent, and the release was procured while such employee was confined in the hospital, and before he had recovered from the shock resulting from his injury. Plaintiff did not read the release, before he signed it, and there was evidence tending to show that its contents were misrepresented to him by the agent of the defendant. At the time the release was signed, plaintiff was without the aid or advice of friends or counsel. In the instant case, the negotiations which resulted in the settlement of plaintiff's claim, and the execution by him of the release, were begun by the plaintiff, and were conducted for him by an attorney at law, retained by him for that purpose. The good character and high professional standing of this attorney at law is conceded.

Although the jury has found that plaintiff has suffered damages in the sum of $2,000, by reason of his injury, it cannot be held that the sum of $500, paid to plaintiff by defendant, in settlement of his claim, before the commencement of this action, was grossly inadequate, and that therefore this fact alone is evidence of fraud. In *Knight v. Bridge Co.,* 172 N. C., 393, 90 S. E., 412, it is said that "the controlling principle established by our authorities is that inadequacy of consideration is a circumstance to be considered on the issue of fraud, and that if it is so gross that it would cause one to say that nothing was paid, it would be sufficient to be submitted to the jury without other evidence; but we have not said that a contract could be set aside as a matter of law because of gross inadequacy." It is only when the consideration for the contract is

so grossly inadequate as to cause general comment that nothing was received by the party against whom the contract is alleged to be conclusive, that such consideration alone is sufficient evidence that the contract was procured by fraud. The payment of $500, in settlement of an unliquidated claim for damages, before liability has been established, and without the delay and expense necessarily incident to litigation, is not grossly inadequate, although the damages are thereafter assessed by a jury, in an action involving issues of liability as well as an issue of damages, at $2,000. In the instant case, the evidence shows that defendant paid to plaintiff, not only the sum of $500, but also all expenses incurred by him, both before and after the execution of the release, for hospital and surgical services, required because of his injury.

The fact as shown by the evidence that plaintiff and his attorney relied upon the representations made to both the plaintiff and the defendant, by Dr. Hipp, the physician employed by defendant to treat plaintiff's injured arm, with respect to plaintiff's recovery from his injury, was not sufficient to avoid the release. Both plaintiff and his attorney understood from the very nature of the representations that they were based upon the opinion which Dr. Hipp had formed of the extent and character of plaintiff's injury. There was no evidence tending to show that the representations were not made in good faith, upon an opinion honestly formed, after a skillful treatment of plaintiff's injured arm by Dr. Hipp. There was no evidence tending to show that the representations as to his opinion with respect to plaintiff's recovery from his injury, were made by Dr. Hipp to induce plaintiff to settle his claim against the defendant for damages. There was no evidence tending to show a misrepresentation by Dr. Hipp as to the condition of plaintiff's arm, at the date of the representation; all the representations were as to the future. All the evidence shows that Dr. Hipp is a highly reputable physician, residing in the city of Charlotte, N. C.; that as the result of his treatment of plaintiff's broken arm, there was a good union of the broken bones, and that the condition of plaintiff's arm at the time of the trial is due to a nerve involvement which was discovered after the date of the release. When plaintiff accepted the sum of $500, in settlement of his claim against defendant for damages, and executed the release, before the expiration of the time within which Dr. Hipp advised him that he would be able to return to work, he did so at his risk, that his damages might exceed the sum voluntarily paid by defendant.

In *McMahan v. Spruce Co.,* 180 N. C., 636, 105 S. E., 439, there was evidence of an actual misrepresentation of plaintiff's condition, resulting from his injury, by the physician who was employed by defendant to treat his injury. There was also evidence of fraud in procuring the

release and a want of consideration therefor. It was held that the evidence was properly submitted to the jury. The decision in that case is not authoritative in the instant case.

It has been repeatedly held by this Court that a release executed by an injured party, and based on a valuable consideration, is a complete defense to an action for damages for the injuries. It is only when it is alleged and established by evidence that the release was procured by fraud, or duress, or oppression that it can be avoided. In the instant case, we find no evidence upon which the plaintiff can be relieved from the terms of his contract with defendant, that upon the payment to him of the sum of $500, he would release defendant of any and all causes of action which he had, or which he might thereafter have, against defendant for damages by reason of his injury sustained on 11 April, 1928. Plaintiff having chosen to settle his claim before the full extent of his injury had been ascertained, thereby taking the risk that his damages might exceed the sum paid to him in settlement of his claim, must abide his contract. He has failed to show any facts upon which this Court, which has been jealous of the rights of injured employees to damages for which the employer is liable, may relieve him of the effect of his contract. The judgment must be

Reversed.

SILAS FRIZZELL v. SOUTHERN MICA COMPANY AND ALBERT RABY.

(Filed 18 December, 1929.)

Removal of Causes C b—Mere denial of allegations upon which action is founded is insufficient to show fraudulent joinder.

Where it is alleged in the complaint that the resident defendant was employed by his codefendant as a foreman, and that the plaintiff's injuries were caused by the joint tort of the defendants, and the allegation that the resident defendant was an employee of his codefendant is not denied in the petition for removal, a mere denial of the allegations upon which the cause of action is founded is not sufficient to sustain the contention that the joinder of the resident defendant was fraudulent, and the petition for removal of the cause from the State to the Federal Court is properly denied.

APPEAL by defendant, Southern Mica Company, from *McElroy, J.*, at May Term, 1929, of JACKSON. Affirmed.

This action was heard upon plaintiff's appeal from the order of the clerk of the Superior Court of Jackson County, that the action be removed from said Superior Court to the District Court of the United

States for the Western District of North Carolina, for trial, in accordance with the prayer in the petition of the defendant, Southern Mica Company.

From order overruling the order of the clerk, and denying the prayer of its petition, the defendant, Southern Mica Company, appealed to the Supreme Court.

Doyle D. Alley and Alley & Alley for plaintiff.
A. Hall Johnston for defendant.

PER CURIAM. It is alleged in the complaint, and not controverted in the petition for removal that the defendant, Albert Raby, a resident of this State, at the date of plaintiff's injury, was employed by his co-defendant, a nonresident corporation, as a foreman in its mine in Macon County, North Carolina. Plaintiff alleges that his injuries were caused by the joint tort of the defendant. The allegations of the complaint upon which the cause of action is founded are controverted in the petition for removal. This is not sufficient to sustain the contention that the joinder of the resident defendant with the nonresident was fraudulent. *Hurt v. Mfg. Co., ante,* 1.

The order denying the prayer for the removal of the action from the State Court to the Federal Court is affirmed upon the authority of *Feaster v. McLelland Stores Company, ante,* 31; *Givens v. Manufacturing Company,* 196 N. C., 377, 145 S. E., 681; *Swain v. Cooperage Co.,* 189 N. C., 528, 127 S. E., 538.

Affirmed.

LESTER MATTHEWS v. BLACKWOOD LUMBER COMPANY AND BABE FORTNER.

(Filed 18 December, 1929.)

Removal of Causes C b—In this case held: petition sufficiently alleged severable controversy and fraudulent joinder, and should have been granted.

Where the petition for the removal of a cause from the State to the Federal Court alleges with particularity that the resident defendant was not an employee of the nonresident defendant, and that the plaintiff knew of this fact and joined him as a defendant fraudulently for the sole purpose of preventing a removal, the petition for removal should have been granted.

APPEAL by defendant from *McElroy, J.,* at May Term, 1929, of JACKSON.

Motion by the Blackwood Lumber Company to remove cause to the District Court of the United States for the Western District of North Carolina for trial. Motion denied, and defendant appeals.

Morgan, Ward & Stamey for plaintiff.
J. Hall Johnston for defendant.

PER CURIAM. Plaintiff bases his cause of action on a joint tort alleged to have been committed by the defendant, Blackwood Lumber Company, a nonresident corporation, and its "swamp" foreman, Babe Fortner, a citizen and resident of Jackson County, North Carolina.

In the petition to remove, filed by the nonresident corporation, it is alleged with particularity that T. A. Bateman, and not Babe Fortner, was foreman in charge of the defendant's camp operations at the time of plaintiff's injury; that J. M. Price, and not Babe Fortner, was the "swamp" foreman in immediate charge of the work; that the plaintiff well knew these facts when the contrary was asserted in his complaint, and that both the allegations with respect to Fortner and his joinder as a party defendant were fraudulently made for the sole and only purpose of preventing a removal of the cause to the Federal Court for trial.

Under the principles announced in *Rea v. Mirror Co.*, 158 N. C., 24, 73 S. E., 116, and approved in later decisions, it would seem that the nonresident defendant is entitled to have the cause removed to the Federal Court for trial.

Reversed.

MRS. JESSE WELCH v. INDEPENDENT COACH LINE, INC.

(Filed 18 December, 1929.)

1. Evidence K b—Expert witness may testify as to what X-ray pictures revealed in respect to the injury.

Where an expert witness testifies that he had examined X-ray pictures of the injury, taken under his supervision, and that he had later lost them, it is competent for him to testify from memory as to what the pictures disclosed in regard to the injury in corroboration of his previous testimony as to what he had discovered upon his examination of the injury, and the admission of such testimony is not an admission of the X-ray pictures as substantive evidence, and an objection thereto on this ground cannot be sustained.

2. Highways B c—Instruction as to legal speed on highway held not erroneous under the evidence in this case.

On appeal an instruction of the trial court to the jury will be considered with the evidence in the case, and an instruction that it is negligence as a matter of law for a person to drive a car on the highway at such rate of

speed that the car cannot be stopped within the distance which the driver is able to see an object on the highway in front of him, is not held erroneous where the evidence discloses that the driver could have seen the wagon, which he hit, at a distance of one thousand feet.

APPEAL by defendant from *Harwood, J.*, at May Term, 1929, of HAYWOOD. No error.

The plaintiff sued to recover damages for personal injuries caused by the collision of the bus in which she was traveling as a passenger with a wagon standing at a side of the highway. The wagon was loaded with poles which, as a result of the impact, broke the windshield and injured the plaintiff. The two issues of negligence and damages were answered in favor of the plaintiff, and from the judgment awarded upon the verdict the defendant appealed, assigning error.

Morgan, Ward & Stamey for plaintiff.
Thomas S. Rollins, Jr., for defendant.

PER CURIAM. The plaintiff's first witness was a dentist, who testified minutely concerning her injuries. The witness then said that under his supervision X-ray pictures had been made of the injury in her mouth, and that he had examined the pictures and had lost them. His testimony as to what the pictures revealed was admitted, subject to the defendant's exception, in corroboration of what he had previously testified to as discovered in his examination. It is contended by the appellant that this ruling was in effect the admission of the X-ray pictures as substantive evidence. We think not. If the pictures had been in the hands of the witness they would have been subject to explanation, and the fact that they had been lost and were not available would not as a matter of law exclude an explanation based upon the memory of the witness as to what the pictures disclosed. It is nowhere intimated that they were admitted as substantive evidence. *Honeycutt v. Brick Co.*, 196 N. C., 556. It is the common practice to receive maps, diagrams, photographs, and pictures for the purpose of giving a representation of objects and places which generally cannot be conveniently described by witnesses. Especially is this true of X-ray pictures which usually require an explanation by parol.

The appellant excepted to the following instruction: "It is negligence, as a matter of law, for a person to drive an automobile on a traveled public highway used by vehicles and pedestrians at such rate of speed that such automobile cannot be stopped within the distance which the operator of said car is able to see an object on the highway in front of him, and that same rule applies to persons operating a bus on the highway."

A similar instruction was approved in *Nikoleropoulos v. Ramsey,* 214 Pac., 304, which is cited in *Weston v. R. R.,* 194 N. C., 210. In the latter case the principle, while not disapproved, was not strictly applied. But the instruction given in the case before us must be considered in its application to the evidence; and when so applied it must be sustained. There is evidence tending to show that the wagon could have been seen by the driver of the bus at a distance of one thousand feet, although the rays of the sun were directly in the driver's face. The driver testified that he was familiar with the road; that it was two or three hundred yards from the curve to the place of the collision, and that he was not blinded until he "got right on the wagon." Considered in its application to the evidence, there was no error in the instruction.

No error.

HUGH J. ROGERS v. J. R. STEPHENS ET AL.

(Filed 18 December, 1929.)

Deeds and Conveyances F e—In this case held: owner could recover from grantees in timber deed of his tenant-at-will for removal of timber.

Where the defendants entered upon lands of the plaintiff and committed trespass in cutting and removing trees growing thereon under an unauthorized contract made with the plaintiff's tenant-at-will, the defendants knowing of the tenancy and that their grantee did not claim the land adversely to the plaintiff, and no facts are shown to estop the plaintiff, he may maintain his action for damages, and a judgment of the trial court dismissing the action is erroneous.

APPEAL by plaintiff from *McElroy, J.,* at May Term, 1929, of JACKSON. Reversed.

Action to recover damages for trespass on the land of plaintiff, and for cutting and removing timber from said land.

From judgment dismissing the action at the close of the evidence, plaintiff appealed to the Supreme Court.

Sutton & Stillwell for plaintiff.
W. R. Sherrill and Alley & Alley for defendants.

PER CURIAM. The evidence tends to show that plaintiff is the owner of five-sixths undivided interest in the land described in the complaint; that the defendants, J. R. Stephens and W. M. Ingram, entered upon said land during the months of June, July and August, 1928, and cut

and removed from said land timber trees, worth at least several hundred dollars; and that said defendants entered upon said land and cut and removed said timber trees under a contract with the defendant, Erma Rogers.

The evidence tended further to show that the defendant, Erma Rogers, was in possession of the land as the tenant-at-will of plaintiff and those under whom he claims, and that her codefendants knew when they entered into the contract with her and paid her for said timber trees, that she did not claim the land adversely to plaintiff. There was no evidence tending to show that plaintiff or those under whom he claims authorized Mrs. Erma Rogers to sell the timber on said land, as contended by her codefendants.

There was error in allowing the motion of defendants, J. R. Stephens and W. M. Ingram, for judgment as of nonsuit. *White v. Fox,* 125 N. C., 544, 34 S. E., 645, is not an authority in support of said motion. No facts are shown by the evidence upon which plaintiff is estopped as the true owner of the land from maintaining this action to recover damages resulting from the trespass of the defendants, in wrongfully entering upon said land and without authority cutting and removing timber trees therefrom.

The defendant, Mrs. Erma Rogers, filed no answer to the complaint; plaintiff is not demanding judgment against her.

The judgment dismissing the action against the defendants, J. R. Stephens and W. M. Ingram, is

Reversed.

W. M. HARRIS AND R. L. HARRIS v. C. COMOLLI AND B. F. COGGINS.

(Filed 30 December, 1929.)

Contracts A g—Contract in this case held not to be founded on agreement to work fraud on receiver and court.

Where under the terms of a contract certain creditors and stockholders of an insolvent corporation in the hands of a receiver agree to procure the sale by the receiver of the corporate property to the defendants for a sum sufficient to pay the costs of receivership and the liabilities of the corporation other than to the plaintiffs, and the defendants agree to buy in the property and to organize a corporation with a paid in capital stock in a certain amount and to issue to the plaintiffs stock in such corporation to an agreed amount, upon the procurement of the sale by the receiver and its confirmation by the court, and the release by the plaintiffs of their claims against the receiver as stockholders and creditors, and the payment of all other claims and costs by the receiver: *Held,* the contract was not founded upon an agreement to work a fraud on the receiver and the court, and the defendants may not maintain that it was void as against public policy on this ground.

HARRIS *v.* COMOLLI.

APPEAL by defendants from *McElroy, J.*, at June Term, 1929, of CHEROKEE. No error.

Action to recover damages for the breach of a contract by which defendants agreed to organize and pay in the sum of $125,000 as the capital stock of a corporation, and to issue to plaintiffs shares of stock therein of the par value of $25,000, in payment for the interest of plaintiffs, as creditors and stockholders of the Regal Marble Company, in property which plaintiffs had procured the receivers of said Regal Marble Company to sell and convey to defendants, in accordance with their contract with defendants.

In their answer, defendants denied that they entered into the contract with plaintiffs as alleged in the complaint. They also alleged that the contract as set out in the complaint is based upon an illegal or immoral consideration, and that, therefore, no cause of action in favor of plaintiffs and against the defendants can be founded upon said contract.

The issues submitted to the jury were answered as follows:

1. Did the defendants enter into the contract with the plaintiffs as alleged in the complaint? Answer: Yes.

2. Was said contract based upon an illegal or immoral consideration as alleged in the answer? Answer: No.

3. Did defendants breach said contract as alleged? Answer: Yes.

4. What damages, if any, are plaintiffs entitled to recover of the defendants? Answer: $25,000.

From judgment on the verdict that plaintiffs recover of the defendants, and the surety on the bond given by them for the release of their property from the attachment levied in this action, the sum of $25,000, defendants appealed to the Supreme Court.

J. D. Mallonee and Moody & Moody for plaintiffs.
S. W. Black and F. O. Christopher for defendants.

CONNOR, J. There was evidence at the trial of this action tending to sustain the allegation in the complaint, which was denied in the answer, that plaintiffs and defendants entered into the contract as alleged in the complaint. The performance of said contract by the plaintiffs, and its breach by the defendants are not controverted. There was evidence in support of the findings by the jury that plaintiffs are entitled to recover of the defendants, as damages for their breach of said contract the sum of $25,000.

Defendants' contention upon their appeal to this Court is that plaintiffs have no right of action upon the contract alleged in the complaint, for that said contract upon its face is illegal because it is immoral and in violation of a sound public policy. Defendants contend that the con-

tract as alleged in the complaint contemplates a fraud on the receivers of the Regal Marble Company, and on the court by which the said receivers were appointed. They rely upon the principle that any agreement which tends to work a fraud or an imposition on a court of justice is void as against public policy. 13 C. J., p. 447, section 385.

The contention of the defendants was presented to the trial court by their demurrer *ore tenus* to the complaint, and also by their motion for judgment as of nonsuit at the close of all the evidence. Defendants excepted to the refusal of the trial court to sustain their demurrer *ore tenus,* and also to its refusal to sustain their motion for judgment as of nonsuit. Defendants also excepted to the instruction of the trial court to the jury that there was no evidence from which the jury could find that the contract as alleged in the complaint is illegal or immoral, and that the jury should answer the second issue "No." In this Court, defendants rely chiefly upon assignments of error based on these exceptions.

It is alleged in the complaint, and the evidence for the plaintiffs tended to show, that plaintiffs and defendants entered into a contract by which plaintiffs agreed to procure the sale by the receivers of the Regal Marble Company to the defendants, of the property of said company, then in the hands of said receivers, for a sum sufficient in amount to satisfy the claims of all the creditors of said company, except the plaintiffs, and to pay the expenses of the receivership; that said sum was ascertained from the receivers to be $17,750; and that said property, at the date of said contract, exceeded in value the sum of $40,000. By the terms of said contract, defendants agreed that upon the sale and conveyance to them by the receivers of the Regal Marble Company of the property of said company, then in their hands, they would pay to said receivers the sum of $17,750, and would thereafter organize a corporation with a capital stock of $125,000, which they would pay in cash, to which they would convey said property; upon the organization of said corporation, defendants agreed to issue to plaintiffs shares of stock therein of the par value of $25,000 in satisfaction of the interest of plaintiffs in the property of the Regal Marble Company.

Plaintiffs were creditors of the Regal Marble Company, holding claims against said company for a large amount; they were also stockholders of said company, owning and controlling, under a power of attorney, all the capital stock of said company. They had been authorized by the receivers to secure a bid for the property of said company, then in their hands, with the assurance that if the amount of said bid was sufficient for the satisfaction of the claims of all the creditors, except the plaintiffs, and for the payment of the expenses of the receivership, the said receivers would report the same to the court, with their

recommendation that same be accepted. The receivers had assured plaintiffs that upon the acceptance of such bid by the court, and the payment of the amount of said bid to them, they would sell and convey the property of the Regal Marble Company to the plaintiffs, or to such person or persons as plaintiffs should direct, provided the plaintiffs released the receivers from all their claims upon them, as creditors or as stockholders.

After plaintiffs and defendants had entered into the contract alleged in the complaint, the plaintiffs advised the receivers that defendants would pay to them for the property of the Regal Marble Company, then in their hands, the sum of $17,750, and requested the receivers to report the bid of the defendants to the court, and ask that same be accepted. It was understood and agreed by and between plaintiffs and the receivers that plaintiffs would claim no part of said sum to be paid by the defendants for said property, as creditors of the company, but that said sum should be expended by the receivers in satisfaction of the claims of other creditors, and in payment of the expenses of the receivership. Plaintiffs did not inform the receivers of their agreement with defendants with respect to the organization of a corporation, and to the issuance to plaintiffs of shares of stock in said corporation.

The receivers reported the bid of the defendants to the Superior Court, and recommended that they be authorized by the court to accept same. Upon the assurance of the receivers that the said bid was sufficient in amount for the satisfaction of the claims of all the creditors of the Regal Marble Company, except plaintiffs, and for the payment of the expenses of the receivership, and that plaintiffs, both as creditors and as stockholders of the Regal Marble Company had requested that said bid be accepted, upon the agreement with the receivers, that they would claim no part of said sum as creditors, the court authorized the receivers to accept the bid of defendants, and upon the payment of the sum of $17,750 by defendants to sell and convey to them all the property of the Regal Marble Company, then in the hands of the receivers. The subsequent sale and conveyance by the receivers of said property to the defendants was approved and confirmed by the court. The claims of all the creditors of the Regal Marble Company, except the plaintiffs, and all the expenses of the receivership, have been paid by the receivers out of the amount paid to them by defendants. Plaintiffs have received nothing from the receivers either as creditors or as stockholders. They released the receivers of all liability to them, both as creditors and as stockholders, and consented to the sale of the property of the Regal Marble Company to defendants, in consideration of defendants' agreement to organize a corporation with a paid-in capital stock of $125,000, which should take title to the property conveyed to

them by the receivers, and to issue to them shares of stock in said corporation of the par value of $25,000.

Defendants, after obtaining title to and control of the property of the Regal Marble Company, failed and refused to perform their contract with plaintiffs, with respect to the organization of the proposed corporation and the issuance of shares of stock therein to plaintiffs. They have sold said property to a stranger, receiving therefor the sum of about $45,000. They have refused to account with plaintiffs for or to recognize the interest in said property which plaintiffs have under the contract.

It is not alleged or contended by defendants that plaintiffs induced them to enter into the contract for the purchase of the property of the Regal Marble Company by means of fraud on them. They allege only that said contract was a fraud on the receivers and on the court. Neither the receivers nor the court has made this contention, although the pleadings in the action contain a full disclosure of the terms of the contract between plaintiffs and defendants. The contention of defendants in this case cannot be sustained. The contract as alleged in the complaint is not founded upon an agreement of plaintiffs and defendants to work a fraud on the receivers of the Regal Marble Company, or on the court, under whose supervision and orders said receivers had control of the property of said company; there was no evidence from which the jury could have answered the second issue in the affirmative; in the absence of such evidence the jury was properly instructed by the court to answer the second issue "No." The judgment is affirmed. There is

No error.

IDA McDOW RODMAN v. J. L. RODMAN, JR.

(Filed 30 December, 1929.)

1. Evidence M a—In this case held: defendant had put his character in issue and testimony as to his general reputation was competent.

In an action by the wife against her husband for awarding of permanent alimony under the provisions of C. S., 1667, where the defendant asks the wife's character witness questions to establish his own good character, he thereby places his own character in evidence, and a question asked a witness as to the general reputation of the defendant as being "mean to his wives" is not error when the witness has testified that he knew the general reputation of the husband.

2. Divorce D e—Instructions as to "indignities to the person" and "intolerable condition" held not erroneous in this case.

A statement made in the charge of the judge to the jury in an action of the wife against her husband for permanent alimony that he could not

specifically explain when the condition of the wife would become intolerable, is not error, when taken in relation to other parts of the charge it appears that he has in substance charged the jury that both parties might become angry and say and do things that they should not have said or done, but that such intermittent acts would not necessarily be sufficient to constitute a cause of action for divorce, leaving it for the jury to determine whether the "indignities" under the evidence was sufficient. As to the meaning of the word "indignities" used in the statute see *Taylor v. Taylor*, 76 N. C., 345; *Sanders v. Sanders*, 157 N. C., 229; *Page v. Page*, 167 N. C., 346.

3. Trial E e—Where instructions requested are substantially given in the charge refusal of request is not error.

The refusal of the trial judge to give special instructions requested will not be considered error when the essential principles of the request are given in the general charge.

CIVIL ACTION, before *Clement, J.*, at August Term, 1929, of UNION.

The plaintiff instituted an action against her husband for permanent alimony without divorce under C. S., 1667.

One issue was submitted to the jury, to wit: "Did the defendant offer such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome?" The jury answered the issue "Yes." Judgment was entered upon the verdict decreeing that the defendant pay to the plaintiff the sum of $75 per month on the 15th day of each month until further order of the court. It was further decreed that the defendant pay the sum of $500 counsel fees.

From judgment rendered the defendant appealed.

John C. Sikes and Vann & Milliken for plaintiff.
Gillam Craig, R. S. Stewart and H. B. Adams for defendant.

BROGDEN, J. The evidence tends to show that both plaintiff and defendant are persons of good character and standing in the community, and it will serve no useful purpose to recapitulate the evidence. There was sufficient evidence, based upon adequate allegation, when liberally construed, to warrant the verdict.

The first and second exceptions are based upon a question asked by counsel for plaintiff to a witness offered by the plaintiff. The question propounded on redirect examination was as follows: "Now, Mr. McDonald, I ask you if he (defendant) doesn't have the general reputation also of being mean to his wives?" The defendant objected, and the objection was overruled. The witness answered, "Yes, sir."

Standing alone, and nothing else appearing, the ruling of the court was erroneous. But it appears that plaintiff offered this witness who testified as to her good character, and thereupon the defendant, upon cross-examination, undertook to prove his character by said witness.

Therefore, the defendant placed his character in issue before the jury. Furthermore, in response to questions by the court the witness testified that he knew the general character and reputation of the defendant. Moreover, the defendant was a witness in his own behalf and offered evidence of his good character. It will be observed that no effort was made to offer evidence as to particular acts of misconduct, but that the inquiry was limited to the general character of the party for particular vices or virtues. *S. v. Holly,* 155 N. C., 485, 71 S. E., 450; *S. v. Nance,* 195 N. C., 47, 141 S. E., 468.

The defendant assigned error to the following excerpt from the charge of the court: "Therefore, gentlemen, there is no rule that I can lay down to you which you can specifically consider explaining when the condition of the wife would become intolerable and life burdensome." The record discloses that the excerpt complained of was taken from a portion of the charge in which the trial judge in substance instructed the jury that both parties might become angry and say and do things that ought not to have been said and done, but that such intermittent acts would not be sufficient to constitute a cause of action for a divorce.

The defendant contends that the court was in error in omitting to define the meaning of the term "indignities" contemplated by the statute. This question was discussed by this Court in *Taylor v. Taylor,* 76 N. C., 436, in which it was declared: "The decisions of the Court in *Coble v. Coble* and *Erwin v. Erwin* have not been controverted and must be taken to have settled the meaning of the words 'indignities to the person,' as used in the statute. Insulting and disgraceful language by itself, addressed to the wife by the husband, may not be an 'indignity to the person' in a legal sense; and so, slight personal violence without injury to the body or health, of itself, will not justify a divorce. But both combined, and frequently repeated, would indicate such a degree of depravity and loss of self-command as much more readily to induce a court to believe there was danger of bodily harm, and such a just apprehension of personal injury as to render cohabitation unsafe. No undeviating rule has been as yet agreed upon by the courts, or probably can be, which will apply to all cases in determining what indignities are grounds of divorce, because they render the condition of the party injured intolerable. The station in life, the temperament, state of health, habits and feelings of different persons are so unlike that treatment which would send the broken heart of one to the grave would make no sensible impression upon another." *Sanders v. Sanders,* 157 N. C., 229, 72 S. E., 876; *Page v. Page,* 167 N. C., 346, 83 S. E., 625.

In the light of the principle so announced and adhered to, the exception to the charge cannot be sustained. The defendant submitted certain

prayers for instruction and excepts to the failure of the trial judge to give the instructions as written. However, a close examination of the charge discloses the fact that every essential principle of law requested in the instructions was contained in the general charge.

There are other exceptions in the record, but those discussed herein appear to be the only ones requiring careful examination.

No error.

MRS. C. S. WOLFE v. INDEPENDENT COACH LINE, INC.

(Filed 30 December, 1929.)

1. **Highways B a—Violation of law in regard to passing other cars on highway is negligence per se and actionable when proximate cause.**

   Section 12 (a), ch. 148, Public Laws of 1927, was enacted for the protection of the public upon the roads and highways of the State, and its violation is negligence *per se* entitling the person injured to his damages when there is a causal connection between the negligent act and the injury complained of.

2. **Same—Evidence of negligence in passing car on highway held sufficient to be submitted to the jury.**

   Where there is evidence tending to show that the plaintiff's injury was caused by the driver of the defendant's bus on the highway in failing to clear the automobile of the plaintiff after endeavoring to pass it, after signal, when going in the same direction where the road was amply wide, and to the contrary that the driver of the plaintiff's car, just as the bus was passing, turned into the bus, causing the injury, the issues of negligence, contributory negligence, and damages is properly submitted to the jury under correct instructions from the court.

3. **Highways B g—Where plaintiff is negligent and contributory negligence is a proximate cause no recovery may be had.**

   Where there is evidence tending to show that the driver of the plaintiff's car turned into the defendant's bus as the latter, after signalling, was passing the plaintiff's car, both going in the same direction, and *per contra*, an instruction to the jury to the effect that the plaintiff cannot recover if the defendant has satisfied them by the greater weight of the evidence that the plaintiff was guilty of contributory negligence and that such contributory negligence was the proximate cause or one of the proximate causes of the injury in suit, is not error.

CIVIL ACTION, before *McElroy, J.*, at March Term, 1929, of SWAIN.

The evidence tended to show that the plaintiff was riding in a Ford car on 16 March, 1928, between Sylva and Bryson City, and that her car was struck by a bus owned and operated by the defendant. The car and the bus were traveling in the same direction. Plaintiff's car was operated by her agent, Paul Conley.

The evidence further tended to show that the bus gave a signal to pass plaintiff's car, and that thereupon the driver of the car turned out of the road.

The driver of plaintiff's car narrated the collision and injury as follows: "When the bus hit me his front was toward the right, pulling in toward the right. And I was off of the right-hand side of the road. Absolutely, there was room there at this place for the bus to have passed me and to have stayed on the left-hand side of the road and prevented hitting me. . . . The whole road was about eighteen feet wide. . . . When the bus struck me I was driving the car something like fifteen or twenty miles an hour. . . . I heard the bus blow and I pulled out to let the bus pass. . . . There is a ditch right here about that wide and eighteen inches deep. Mrs. Wolfe said, 'Look out, you will run into the ditch,' and I turned my wheels out of the ditch to keep from running into it, and the bus swung around this way, and I reckon he didn't consider the length of the bus, and it swung to the right, and his rear hit the front of my car. . . . I cut to the left a little bit—toward the bus. The bus would have hit me if I had gone in the ditch."

The defendant offered strong evidence to the effect that the bus did not hit the car at all, but that the car negligently turned into the bus. There was also testimony to the effect that the driver of the car was drinking, and that the car was "wabbling" from one side of the road to the other prior to the collision.

The jury answered the issues in favor of the plaintiff, and awarded $2,050 damages for personal injury sustained by plaintiff and for property damages to the car.

From judgment upon the verdict the defendant appealed.

Edwards & Leatherwood for plaintiff.
Rollins & Smathers for defendant.

BROGDEN, J. Section 12 (a) of chapter 148, Public Laws of 1927, provides as follows: "The driver of any such vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof, and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle."

The evidence discloses three theories as to the cause of the collision and injury:

1. That the bus in passing the car of plaintiff passed within less than two feet thereof in violation of the foregoing statute.

2. That the driver of the bus, after passing the car of plaintiff, turned to the right side of the highway before the overtaken vehicle was safely cleared.

3. That the driver of the overtaken car negligently turned to the left while the bus was in the act of passing, thus running into the bus and causing the injury without negligence or default upon the part of the driver of said bus.

It is now familiar learning that a violation of a statute enacted for the purpose of protecting the public is negligence *per se,* although there must be a causal connection between the breach thereof and the injury complained of. *Whitaker v. Car Company,* 197 N. C., 83. There was evidence to support each theory, and there was strong evidence from disinterested witnesses in support of the third theory; but the jury accepted the testimony tending to show negligence of the defendant. The trial judge instructed the jury upon each and every phase of the case. Upon the third theory of the collision, strongly relied upon by the defendant, the court charged: "The court further charges you that if the defendant has satisfied you by the greater weight of the evidence that upon approaching the plaintiff's car the defendant's driver gave warning of his desire to pass, with his horn, and that thereupon plaintiff's car pulled to the right of the center of the road, and that while the bus was passing the plaintiff's car, plaintiff's driver cut her car sharply to the left, and into the bus, then, gentlemen of the jury, if the defendant has satisfied you, by the greater weight of these facts, the court charges you that the plaintiff would be guilty of contributory negligence, and if the defendant has further satisfied you, by the greater weight of the evidence, that such negligence on the part of the plaintiff was the proximate cause, or one of the proximate causes of her injury, then, gentlemen of the jury, the court charges you that it is your duty to answer the second issue, Yes."

The disputed issues of fact were submitted to the jury upon a charge correctly interpreting the pertinent principles of law, and the judgment cannot be disturbed.

No error.

PRESTON HENDRIX v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 30 December, 1929.)

1. Railroads D b—Violation of ordinance in regard to crossing must be proximate cause of injury to be actionable.

Where in violation of a city ordinance making it a misdemeanor for a railroad company to obstruct a street of the town with its freight train for more than three minutes at a time, and a person attempting to cross the cars of the freight train was injured by his foot being caught between the bumpers of the cars when the train started, the violation of the

ordinance by the railroad company is negligence *per se*, but not actionable since not a proximate cause of the injury, and nothing else appearing in an action to recover damages, a motion for judgment as of nonsuit upon the evidence is properly allowed.

2. Negligence D c—Where there is no evidence of causal connection between negligence and injury a nonsuit is properly granted.

Whether the violation of an ordinance or statute is a proximate cause of the injury in suit is ordinarily a question for the jury, but where there is no evidence of causal connection between the negligence and the injury it is a question for the court, and in such cases the granting of defendant's motion for judgment as of nonsuit is proper.

3. Same—Where evidence discloses contributory negligence barring recovery judgment as of nonsuit is proper.

Where in an action for damages against a railroad company for a negligent personal injury the plaintiff's evidence discloses contributory negligence barring his recovery, the plaintiff has proved himself out of court, and defendant's motion as of nonsuit is properly allowed.

APPEAL by plaintiff from *Grady, J.*, at August Special Term, 1929, of HAYWOOD. Affirmed.

This is an action for actionable negligence, brought by plaintiff against defendants. The action was brought for the alleged wrongful injury to the plaintiff, Preston Hendrix, a boy nearly nineteen years old, who undertook to climb between two box cars of a train of the defendant, on a crossing in Canton, N. C. While the plaintiff was undertaking to climb between the two cars, the train started and the plaintiff got his right foot caught between the draw-head and one of the bumpers of the car and his foot was crushed so that it had to be amputated above the ankle.

Main Street is a principal street and thoroughfare in the town of Canton, N. C. The street runs north and south and the main line and seven switch tracks of the defendant company run east and west, crossing said street.

Section 476 of the Code of the town of Canton is as follows: "That any corporation, conductor, fireman, engineer or other employee of any steam railroad company having tracks running across the public streets of this town, who shall obstruct the same, or prevent the free passage of vehicles and pedestrians longer than three minutes at one time, shall be subject to a penalty of $50 for each and every offense." The defendant was violating this ordinance.

The plaintiff and defendants introduced evidence. The defendant made a motion at the close of plaintiff's evidence and at the close of all the evidence, for judgment as in case of nonsuit. C. S., 567. The court below granted the motion. Plaintiff excepted, assigned error and appealed to the Supreme Court.

S. M. Robinson and Alley & Alley for plaintiff.
Thomas S. Rollins for defendants.

CLARKSON, J. The only question presented on this appeal is the correctness of the ruling of the court below in sustaining the defendants' motion for judgment as in case of nonsuit at the close of all the evidence. Taking the evidence of plaintiff and defendants in the light most favorable to plaintiff, we see no error in the court below sustaining the motion. It is well settled in this jurisdiction that the violation of a town or city ordinance, or State statute, is negligence *per se,* but the violation must be the proximate cause of the injury. Ordinarily this is a question for the jury if there is any evidence, but, if there is no evidence that the violation of the ordinance or statute is the proximate cause of the injury, this is for the court to determine.

"What is negligence is a question of law, and when the facts are admitted or established is for the court." Burdick on Torts, 2d ed., 429; *Hinnant v. Power Co.,* 187 N. C., at p. 293; *Thompson v. R. R.,* 195 N. C., 663.

In *Elder v. R. R.,* 194 N. C., at p. 619, citing numerous authorities, it is held: "Originally, under C. S., 567, in cases calling for its application, there was some question as to whether a plea of contributory negligence (the burden of such issue being on the defendant) could be taken advantage of on a motion to nonsuit, but it is now well settled that such may be done when the contributory negligence of the plaintiff is established by his or her own evidence, as he or she thus proves himself or herself out of court."

There is no evidence to submit an issue of last clear chance. *Buckner v. R. R.,* 194 N. C., 104; *Redmon v. R. R.,* 195 N. C., 764.

The defendant company, according to the contention of plaintiff, was guilty of a misdemeanor under the town ordinance for obstructing Main Street in the town of Canton for over three minutes. The plaintiff in attempting to cross between the two cars while standing took chances, and must bear the burden of his folly. It is a pathetic mishap, which often overtakes youth, and entails suffering sometimes for a lifetime, as in this case. The humanities are appealing, but we cannot take unjustly from one and give it to another. For the reasons given, the judgment is

Affirmed.

S. N. MILLS v. MARION MANUFACTURING COMPANY.

(Filed 30 December, 1929.)

Master and Servant C c; C f—Questions of master's negligence and servant's assumption of risks held for the jury.

Where the evidence tends to show that the master, through his vice-principal, ordered his experienced servant to clean hangers by standing on top of a step-ladder in close proximity to running machinery, it is sufficient to be submitted to the jury on the question of the master's negligence in an action for an injury resulting therefrom, and the question of the assumption of the risks by the servant is for the determination of the jury upon consideration of whether the danger was so open, obvious and imminent that a man of ordinary prudence would not have continued in the employment and incurred them.

CIVIL ACTION, before *Schenck, J.*, at September Term, 1929, of HAYWOOD.

The plaintiff offered evidence tending to show that on 11 October, 1928, he was employed by the defendant and charged with the duty of oiling and banding the machinery in the mill of the defendant, and that it was also the duty of plaintiff to clean the hangers. There was also evidence tending to show that there were three methods for cleaning the hangers. One was to use a pole with a brush attached to the end thereof by means of which the workman could stand on the floor and wipe off the hanger. Another method was to use a blow pipe tied to the end of a pole, which enabled the workman to stand on the floor in performing his duty. The third method was to use a step-ladder.

Plaintiff was required to use a step-ladder, and testified with respect to his injury as follows: "On 11 October, 1928, I was cleaning my hangers. . . . I had them all cleaned but one; was cleaning the last one and was up on a step-ladder, eleven feet high; I was on top of it. I wiped off between part of one of the hangers with a brush, something like a broom handle, and there were some belts running at my back, and one sawed me across the back, and that shoved me forward, and when it did that the end of the brush stick hit the pulleys, and the other end hit me in the right side, and knocked me off. When the belt sawed my back, and the brush stick hit me, it knocked me off the ladder, and broke a couple of ribs, and I didn't know about it until Ralph Styles picked me up. Where I cleaned, the belts were not over 14 or 15 inches apart; but the one at my back wasn't over 15 inches from the hanger where I was cleaning. . . . There was no other position that I could get in to climb the ladder and clean the hangers than the one I was in when the belt hit me across the back. It was the only way I could get up there to clean them at all. Prior to this time we would

slip and clean them with a pole, and they would catch us and stop us. They gave us orders all the time to climb the ladder. I have started several times to clean them with a pole, and they would stop us. That method would permit me to stand on the floor and clean them. . . . The Marion Manufacturing Company's method was to clean while it was running. All the machinery was running at the time I was injured. . . . The alley I was in was awful close."

The defendant offered no evidence.

The usual issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered in favor of plaintiff. The issue of damage was answered in the sum of $1,500.

From judgment upon the verdict the defendant appealed.

W. R. Francis and Alley & Alley for plaintiff.

A. Hall Johnston and J. C. Cheesbrough for defendant.

BROGDEN, J. 1. Is it evidence of negligence to require a workman to clean machinery while in motion?

2. If so, does the act of the workman in so cleaning the machinery constitute contributory negligence or assumption of risk as a matter of law?

These propositions were considered by this Court in *Marks v. Cotton Mills,* 138 N. C., 401, 50 S. E., 769. The rule was thus declared: "To prevent misconception, we desire to say that our decision in this case, based upon the admitted facts, is simply that the allegation of negligence in ordering the machine to be cleaned while in motion should be submitted to the jury; that if they find the issue for the plaintiff, the question of assumption of risk or contributory negligence, alleged to arise out of his remaining in the service, should also be submitted to the jury." *Noble v. Lumber Co.,* 151 N. C., 76, 65 S. E., 622; *Breeden v. Mfg. Co.,* 163 N. C., 469, 79 S. E., 960; *Lynch v. R. R.,* 164 N. C., 249, 80 S. E., 173; *Ensley v. Lumber Co.,* 165 N. C., 687, 81 S. E., 1010; *Maulden v. Chair Co.,* 196 N. C., 122, 144 S. E., 557.

The evidence discloses that the plaintiff was required to place a ladder between running belts in order to clean the hanger. These belts, according to the evidence, were not more than 14 or 15 inches apart, and while he was not actually engaged in cleaning a running part of the machine, it must be apparent that the small space between the belts rendered the place of work dangerous and hazardous. Plaintiff was an experienced employee, and of course appreciated the danger, but the question as to whether the danger was so open, obvious, and imminent that no man of ordinary prudence would continue in the employment, must be submitted to the decision of a jury. *Maulden v. Chair Co., supra.*

No error.

MARY NESBITT v. J. T. DONOHO, ADMINISTRATOR, AND J. E. NESBITT v. J. T. DONOHO, ADMINISTRATOR.

(Filed 30 December, 1929.)

Executors and Administrators D a—In this case held plaintiffs could recover upon quantum meruit for services rendered deceased.

The value of services gratuitously rendered to a deceased person preceding his death are not recoverable against his estate, and while in certain family relationships these services are presumed to be gratuitous, this may be overcome by proof of an agreement to pay, or of facts and circumstances permitting the inference that payment was intended upon the one hand and expected on the other, in which case recovery may be had upon a *quantum meruit*.

APPEAL by defendant from *Finley, J.*, at July Term, 1929, of BUNCOMBE.

Civil actions, brought separately, but, by consent, consolidated and tried together, to recover for services rendered by plaintiffs to defendant's intestate during the last several years of his life.

The evidence tends to show that from 20 August, 1924, when W. J. Nesbitt, father of the male plaintiff, suffered a stroke of paralysis, until his death, 31 July, 1927, the plaintiffs, at the request of defendant's intestate, moved into the home of the said W. J. Nesbitt and ministered to his necessary wants, looked after him in his affliction, cared for him and his wife in their old age, and discharged many onerous duties of a menial nature, under such circumstances and in such manner as reasonably called for compensation, which the jury found was intended to be given and expected to be received.

Upon denial of liability, and issues joined, there was a verdict and judgment for plaintiffs, from which the defendant appeals, assigning errors.

Zeb. F. Curtis and Harkins & Vanwinkle for plaintiffs.
Alfred S. Banard for defendant.

STACY, C. J. Services rendered gratuitously to one in his lifetime may not successfully be used as the basis of an action against his estate, and, in certain family relationships, the law presumes that such services were intended to be gratuitous. *Henderson v. McLain,* 146 N. C., 329, 59 S. E., 873; *Staley v. Lowe,* 197 N. C., 243. But this is a presumption which may be overcome or rebutted by proof of an agreement to pay, or of facts and circumstances permitting the inference that payment was intended on the one hand and expected on the other. *Dunn v. Currie,* 141 N. C., 123, 53 S. E., 533; *Brown v. Williams,* 196 N. C., 247, 145 S. E., 233.

The present case, we think, falls within the class supporting a *quantum meruit* recovery. *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540. The ruling of the court in this respect is approved.

While not material, the case elicited a bit of mountain vernacular, perhaps worthy of preservation. It was in evidence that the plaintiffs' little daughter, eight or nine years of age, was often seen "doing many chores around the house, toting in stovewood and fetching water from a spring about 200 yards away," which, in answer to the question as to whether it was uphill or downhill from the house to the spring, the witness described it as being "downhill a-going and uphill a-coming."

We have discovered no action or ruling of the trial court which, we apprehend, should be held for reversible error. Hence, the verdict and judgment will be upheld.

No error.

J. H. STOCKTON v. H. R. LENOIR, TRUSTEE.

(Filed 30 December, 1929.)

Evidence J a—Parol evidence as to agreement for payment of notes out of particular funds held admissible in payee's action thereon.

Where the owner of lands receives purchase-money notes for the balance of the purchase price of lands, and gives his notes to the selling agent for his commissions for making the sale, in the agent's action upon the notes so given him it may be shown by parol that the commissions were to be paid only upon the amount of actual cash the owner received from the lands, especially when the notes themselves bear evidence of such agreement.

CONNOR, J., dissents.

APPEAL by defendant from *Harwood, Special Judge,* at October Special Term, 1929, of MACON.

Civil action to recover commissions on the sale of real estate evidenced by two notes.

On 18 September, 1925, plaintiff, a realtor, negotiated a sale of land held by the defendant, as trustee for himself and others, to W. D. Almazov and Sophie Albert for $38,000. For his commissions the plaintiff was to be paid 10 per cent of the purchase price of the land, as and when collected from the purchasers, and he has received his commissions on the cash payment made at the time of sale, as well as on all payments subsequently made by Almazov and Albert.

Purchase-money notes, secured by deed of trust on the property, were executed by the purchasers to the defendant, trustee, and corresponding

commission-notes, representing 10 per cent of the purchase-money notes, were executed by defendant to plaintiff. Each of the notes given to plaintiff for his commissions contains the following stipulation: "To be paid out of funds from corresponding note of W. D. Almazov and Sophie Albert, when collected"; and it was the understanding and agreement that the plaintiff's commission-note, representing 10 per cent of the corresponding purchase-money note, was to be paid only out of funds collected from Almazov and Albert, so the defendant alleged and offered to prove.

Upon default in the payment of the purchase-money notes, the deed of trust was foreclosed and the defendant, in his original capacity as trustee, became the highest bidder for the land at $11,000, which is less than half the amount remaining unpaid on the purchase-money notes.

The trial court held that the plaintiff was entitled to collect on his commission-notes 10 per cent of the amount bid at the sale, or $1,100, and instructed the jury to this effect. From the judgment rendered on the verdict, thus directed, the defendant appeals, assigning errors.

R. D. Sisk, Edwards & Leatherwood and George B. Patton for plaintiff.

T. J. Johnston and Moody & Moody for defendant.

STACY, C. J., after stating the case: It appears that the plaintiff and the defendant, who are presumed to know best what was intended by their agreement, have heretofore interpreted the notes in suit to mean that they should be paid only out of funds collected from Almazov and Albert. If this be a reasonable or permissible interpretation of the record, and we think it is, it follows that there was error in the court's peremptory instruction to the jury.

The defendant, it seems, was willing to pay the plaintiff a substantial sum for his services, provided the sale was completed and the full purchase price received in cash; while the plaintiff, on the other hand, apparently assented to the special arrangement that his commissions, though evidenced by notes, should be paid only as and when the purchase money was collected from Almazov and Albert. Accordingly, the plaintiff has been paid 10 per cent of what money the defendant has received out of the transaction, and no more. *Joice v. Bohanan,* 49 N. C., 364. This, the defendant says, accords with the understanding between the parties.

Notwithstanding the due dates, fixed in the notes sued upon, it is permissible to show by parol that a different mode of payment and discharge was contemplated by the parties, especially when the notes them-

selves bear evidence of such agreement. *Bank v. Winslow,* 193 N. C., 470, 137 S. E., 320; *Typewriter Co. v. Hardware Co.,* 143 N. C., 97, 55 S. E., 417.

For the error, as indicated, a new trial must be awarded, and it is so ordered.

New trial.

CONNOR, J., dissents.

LILA WEST, ADMINISTRATRIX OF HARLEY WEST, DECEASED, v. FONTANA MINING CORPORATION.

(Filed 30 December, 1929.)

1. **Appeal and Error E b—Where the charge of the lower court is not set out in the record it is assumed correct.**

   The charge of the judge to the jury is assumed to be correct on appeal when it is not set out in the record.

2. **Master and Servant C b—Employer must use reasonable care to provide reasonably safe place to work.**

   While an employer is not held to the liability of an insurer of the safety of his employees, he is required in the exercise of ordinary care to furnish them a reasonably safe place to do the work required of them, by the means and methods that are approved and in general use at places of like kind and character.

3. **Same—Evidence of negligent failure to provide reasonably safe place to work held sufficient to overrule nonsuit.**

   Where in an action to recover for the negligent killing of the plaintiff's intestate there is evidence tending to show that the intestate was killed by being caught by a piece of timber at the fourth level of defendant's mine while the intestate was riding in a car from one level to another in the performance of his duties, that the timber at the fourth level was lower than the timbers at the other levels, there being only about three inches clearance between the car and the timber, that there was no means of signalling the engineer operating the hoisting machinery at the surface of the mine to stop the car, that the track was uneven and came up in a hump where the injury occurred, that defendant's *alter ego* knew that the timber was dangerous; that there was no light at the fourth level, and that other mines of like character used enclosed cars: *Held,* sufficient to be submitted to the jury on the question of whether the defendant exercised reasonable care to provide a reasonably safe place to work.

4. **Master and Servant C f—Servant is not prima facie chargeable with assumption of extraordinary risks.**

   A servant is not prima facie chargeable with the assumption of an extraordinary risk, or a risk which may be obviated by the employer in the exercise of reasonable care.

5. Same—Assumption of risks is ordinarily question for jury.

In order to establish the defense of assumption of risk it is not sufficient to show that the employee worked on knowing the danger, but the question must be determined whether the danger was so obvious that a man of ordinary prudence would have quit the employment rather than have incurred it, and is ordinarily a question for the jury.

APPEAL from *Harwood, Special Judge,* and a jury, at July-August Term, 1929, of SWAIN. No error.

This is an action for actionable negligence, brought by plaintiff, Lila West, administratrix of Harley West, deceased, against defendant, Fontana Mining Corporation, for killing her husband, Harley West.

The defendant was engaged in mining copper ore in Swain County. Plaintiff's intestate was an employee of defendant. The allegations of the complaint as to negligence was to the effect that defendant did not use due and ordinary care to provide for plaintiff's intestate a reasonably safe place in which to do his work. The defendant denied the allegation of negligence and pleaded assumption of risk and contributory negligence.

Plaintiff's intestate was killed on 18 June, 1928, in the discharge of his duty. Defendant in its underground mining operations had several tunnels, one of which extended from the surface about 700 feet underground at an angle of about 45 degrees, or about one-half slope, being known as an incline or shaft—the tunnel was about 8 feet square. Along this tunnel was operated a narrow-gauge railroad for the purpose of bringing up ore and transporting employees into and out of the mine. A hoisting engine on the surface run by steam was the motive power, and the car or skip was let down into the mine and brought up by means of a wire cable or rope, which wound around a drum. There were about eight levels about 100 feet apart that intersected with the main shaft.

W. R. Barker testified in part: "They had about fifty men employed, I guess. The deceased was killed at the fourth level. I was on the level below. The last time I saw West immediately prior to his death, he was going up on the skip. Leonard McCoy, the conductor, was with him; it was about ten o'clock that night. *There was no light at the level* except the lights they had on their heads. West and the fellow on the skip had lights on their heads. They were miners' lamps. There were no lights on the fourth level provided by the Fontana Mining Corporation. The levels were about 100 feet apart. There was a piece of timber across the fourth level that the skip went up through under it. The dimensions of this skip was two or three feet deep. *The skip passed under the piece of timber across the fourth level just giving good clearance, something like three inches on one side, and maybe a little more on*

the other. It was kind of bent on one side. The timber was higher at other places in the levels, at the fifth, sixth and third levels was higher. *That was the only piece of timber there at that time that was down right near to the skip.* The conductor on the skip told the deceased it was time to take the dull steel out, and told him to get in the skip and go down and bring the steel up and take it out. I have ridden on the skip. *There is no signal device or anything on the skip where the hoisting engine at the top of the ground was operated could be signalled between the different levels to stop the skip or not,* as far as I know. I saw West hanging in between the skip and the timber and his head back behind the skip, and they backed the skip off of him and took him and put him in the skip. I don't remember that I heard him say anything. There were West and the skip conductor and the foreman on the skip. The foreman was Craig, Leonard McCoy was the conductor. *I saw the piece of timber catch him—he was between it and the skip when I saw him.* He only lived a half or three-quarters of an hour after that. They took him to the shop and he died. If the timber had not been there the men could stand up in the skip—good room to stand up. *There was no light in the shaft except the little lights that the employees had on their foreheads.* There was no other way provided for employees to go in and out of the mine except in the skip."

W. C. Sheppard testified in part: *"In putting this piece of timber across the fourth level at the time it was put there I asked Mr. Hughes to put the timber up higher. I told him it would be dangerous down there, and he said if it killed a man he would hire another one.* The incline track had waves or rolls up and down—they don't go on a certain degree at all, *and where it comes under the timber at the fourth level it comes out on a flat space, comes up a hump, and out on a flat space. . . .* (Cross-examination.) The place that we had there the skip cleared it from three to four inches, something like that. Q. And a man that got in the skip and stayed down in the skip was in absolutely no danger at all, was he? A. No, if he kept his head under the skip. Q. And in order to get hit he had to get up there in that place, didn't he? A. Yes. Q. If he was down in the skip and knew all about it—if he hadn't raised his head and got up, there was no danger of getting hit at all? A. No, not by the timber. Q. Nor anything else unless it fell from the top—that is right, isn't it? A. Yes, I would be afraid to say how many times I have ridden that shaft—several hundred times, anyway. Q. And you never got hit by this timber? A. No, for I stayed in the clear. Q. And this man knew that this timber was there? A. He ought to. I have never ridden down there with him. I couldn't say how long he had been carrying steel."

H. S. Brownfield, at one time mining inspector in the State of Ohio, testified in part: "I worked in two mines in Flushing, Ohio, that had an incline; the mines were about two hundred feet deep, *and in carrying men in and out they used man cages. Cage just like a big box—it is enclosed.* They have a fence that they put up when they hoist the men up and down. (Cross-examination.) Don't work anywhere now. I live in Asheville; been there since 1925. I have been to Fontana; I didn't go down in the mine. Over your objection I stated that in a coal mine they used a cage. *It is a cage that covers a man entirely; you can't stick your head out;* that was a coal mine about two hundred feet deep."

D. W. Byrd, who worked in mines about sixteen years, testified in part: "At the Burr mine and London mine they have shafts on an incline road to convey the men in and out of them. The Burr mine had twelve levels, and the London mine nine, I believe. There was an incline up this shaft past each of the levels; there were timbers in the shaft. *The men that worked in the Burr and London mines in Tennessee, were conveyed in and out of the mines with the man cage. A man cage is a steel cage that is fastened by bars. It is closed when the men are going in and out of the mine to keep any part of them getting out or getting caught,* and in these mines the men who convey the powder and steel use the cage that is used for the men."

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Was the plaintiff's intestate injured and killed by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did plaintiff's intestate by his own negligence contribute to his injury and death, as alleged in the answer? Answer: No.

3. What damage, if any, is plaintiff entitled to recover? Answer: $5,000."

The defendant introduced no evidence. At the close of plaintiff's evidence the defendant moved for judgment as in case of nonsuit. C. S., 567. The motion was overruled, defendant excepted, assigned error and appealed to the Supreme Court.

B. C. Jones and Edwards & Leatherwood for plaintiff.

A. Hall Johnston for defendant.

CLARKSON, J. The charge of the court below is not set forth in the record; the presumption is that the court below charged fully under the facts the law applicable to negligence, contributory negligence and damage. *Crisp v. Thread Mills,* 189 N. C., 89.

In *Street v. Coal Co.,* 196 N. C., at p. 181-2, the law is thus stated: "It is the duty of the employer, in the exercise of ordinary care, to furnish an employee with a reasonably safe place to work. This is especially so where the place is more or less dangerous. The employer is not an insurer of the employee's safety. Before directing an employee to work in a place of more or less danger, it is the duty of the employer to use due care to see that the place is reasonably safe for the employee to perform his work. To do this, it is the duty of the employer to use such means and methods that are approved and in general use at a place of like kind and character." *Deligny v. Furniture Co.,* 170 N. C., 189; *Jefferson v. Raleigh,* 194 N. C., 479; *Mauldin v. Chair Co.,* 196 N. C., 122; *Ellis v. Herald Co.,* 196 N. C., 262; *Shorter v. Cotton Mills, ante,* 27.

In the present case the plaintiff's intestate, who carried steel to the workmen and took the dull steel up, in the underground operation of defendant's copper mine, was required to ride in a car or skip when it went up and down in the narrow gauge railroad in the mine, in the performance of his duty. The underground narrow-gauge railroad extended from the surface about 700 feet down into the earth, the incline being about 45 degrees. In the mine there were about eight levels, about 100 feet apart, that intersected with the main shaft. Plaintiff's intestate was killed at the fourth level. A witness for plaintiff testified "I saw the piece of timber catch him; he was between it and the (car or) skip when I saw him." The evidence of plaintiff was to the effect: (1) That the car or skip passed under the piece of timber across the fourth level just giving clearance, something like three inches. (2) That the piece of timber that caught plaintiff's intestate at the fourth level was the only piece of timber that "was down right near to the (car or) skip." (3) There was no signal device on the car or skip to the engineer running the hoisting engine on the surface by which he could be signalled to stop or start the car or skip being operated underground at the different levels. (4) The incline track had waves or rolls up and down and at the fourth level where plaintiff's intestate was killed "it comes out on a flat space, comes up a hump and out on a flat space." (5) The *alter ego* of defendant when constructing the fourth level was asked to put the timber higher and was told it would be dangerous, and he said "If it killed a man he would hire another one." (6) There was no light at the fourth level. (7) A former mining inspector and miner of years of experience in other mines, testified that the method used in other mines of like kind and character "in carrying men in and out they used man cages, cage just like a big box; it is enclosed . . . is a cage that covers a man entirely; you can't stick your head out."

On the question of negligence of defendant, there was ample evidence to be submitted to the jury as to whether the defendant, in the exercise of due or ordinary care, provided plaintiff's intestate a reasonably safe place in which to do his work.

As to whether plaintiff's intestate was guilty of contributory negligence or assumed the risk, Labatt, Master and Servant, 3d Vol., 2d ed., part sec. 1178, p. 3143, speaking to the subject, says: "A principle which has been formulated and applied so frequently as to have become axiomatic is that a servant is prima facie not chargeable with an assumption of extraordinary risks—risks, that is to say, which may be obviated by the exercise of reasonable care on the master's part." *Hough v. Texas & P. R. Co.,* 100 U. S., 213, 25 L. Ed., 612, 615; *Lloyd v. Hanes,* 126 N. C., 359; *Wilson v. Lumber Co.,* 185 N. C., 571. The principle laid down by Mr. Labatt as axiomatic, has long been the law in this jurisdiction.

In *Hicks v. Mfg. Co.,* 138 N. C., 319, *Justice Hoke,* writing for the Court, lucidly and humanely goes into the entire subject. According to Shepard's N. C. Citations, June, 1929, that case has been cited forty-one times.

In *Hines v. R. R.,* 185 N. C., at p. 75, it is said: "Assumption of risk is also a matter of defense analogous to contributory negligence to be passed upon by the jury who are to say whether the employee voluntarily assumed the risk; it is not enough to show merely that he worked on, knowing the danger. *Lloyd v. Hanes,* 126 N. C., 359; the numerous cases cited thereto in the Anno. Ed.; C. S., 3468."

In *Hamilton v. Lumber Co.,* 156 N. C., at p. 523-4, speaking to the subject: "It is further held, in this jurisdiction, that the doctrine of assumption of risk, in its technical acceptation, is no longer applicable *(Norris v. Cotton Mills,* 154 N. C., 475; *Tanner v. Lumber Co.,* 140 N. C., 475), but the effect of working on in the presence of conditions which are known and observed must be considered and determined on the question whether the attendant dangers were so obvious that a man of ordinary prudence and acting with such prudence should quit the employment rather than incur them.' *Bissell v. Lumber Co.,* 152 N. C., 123." *Ogle v. R. R.,* 195 N. C., at p. 797.

In the judgment of the court below we find

No error.

J. HYMAN MEWBORN v. THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., AND L. J. MEWBORN, ADMINISTRATOR OF N. PALMER MEWBORN, JR.

(Filed 30 December, 1929.)

1. Insurance J d—Condition that notice of accident be given immediately to the insurer is construed to mean with reasonable promptness.

The condition in a policy of accident insurance that notice of an accident covered by the policy be given the insurer immediately in writing will be construed to mean with reasonable promptness, or to impose upon the insured the duty to exercise reasonable diligence in giving the required notice, measured by his ability and opportunity to act in the premises, and a forfeiture of the policy for failure to comply strictly with such provision will not be declared where the notice given complies substantially with the spirit and meaning of the contract.

2. Same — Whether insured gave notice of accident with reasonable promptness held question for the jury.

Where notice of an accident covered by the policy of insurance is given the insurer two months and a half after the accident and a month and four days after the extent of the injury is known, and there is evidence tending to show that the mind of the insured was so affected by the accident that he was incapable of giving notice, and that the notice was given in time for the insurer to protect itself so that neither the risk nor the rights of the insurer were jeopardized by the delay: *Held*, the question of whether the notice given was a sufficient compliance with the condition of the policy requiring immediate written notice of an accident was for the determination of the jury under the facts and circumstances of the case.

BROGDEN, J., dissents.

APPEAL by defendant, Assurance Corporation, from *Nunn, J.*, at June Term, 1929, of LENOIR.

Civil action to recover on a personal-injury and property-damage contract of insurance.

By the terms of the policy in suit, the defendant agreed to indemnify the plaintiff, owner of the 1923 model Ford roadster covered by the contract of insurance, against (1) loss from legal liability for damages on account of bodily injuries, including death resulting therefrom, accidentally sustained by any person, to the extent of $5,000 for one person, and $10,000 for more than one, and (2) loss from legal liability for damages on account of the accidental injury to or destruction of property covered by the policy, including the resultant loss of use of such property, subject, among other things, to the following stipulation:

"Notice.—Condition C. Upon the occurrence of an accident covered by this policy, the assured shall give immediate written notice thereof to

the corporation or its duly authorized agent. The assured shall give like notice with full particulars of any claim made on account of any such accident. If any suit or other proceeding mentioned in Agreement III is instituted against the assured on account of any such accident, the assured shall immediately forward to the corporation or its duly authorized agent every notice, summons, or other process served upon the assured."

The policy of insurance was in force on 28 June, 1925, when plaintiff's car, operated by his adopted son and in which his nephew, N. Palmer Mewborn, Jr., was riding, collided with another car on the Kinston-Snow Hill highway, resulting in serious bodily injury to plaintiff's said nephew, from which he died 8 August, 1925.

Written notice of the accident was given to the defendant on 12 September following. Defendant denied liability because of plaintiff's delay in giving notice.

Thereafter, at the November Term, 1927, Lenoir Superior Court, the administratrix of N. Palmer Mewborn, Jr., deceased, in an action for wrongful death, recovered a judgment against the plaintiff in the sum of $10,000. The defendant had due notice of this suit, which was instituted 26 June, 1926, but declined to defend it, or to take any part in its defense, preferring to rely upon its alleged nonliability under the policy because of plaintiff's failure to give immediate notice of the injury.

In excuse of the delay, plaintiff offered the testimony of his physician, partner, and others, tending to show that he was so shocked and overcome by the act of his son-in-law, which caused his nephew to linger in a desperate condition from 28 June till his death on 8 August, as to affect his mental processes and rendered him incapable of "originating an idea or discovering an old one," and unfit to attend to business matters up to the time notice was given to the defendant by plaintiff's wife on 12 September, 1925. He was "much depressed and mentally affected, very much so. There was a very decided change in the man all during that time and for a good while afterwards."

Dr. J. M. Parrott testified in substance as follows: Mr. Mewborn is a man of unusually fine sensibility and high sense of honor. He was profoundly impressed, and during that time was not competent to originate an idea without outside suggestion, though he was entirely competent to transact his business if matters were called to his attention. I do not believe that he would have thought about a financial matter of this character under the circumstances. If his farming operations and other business were called to his attention, he could no doubt have attended to them, and did, but I do not think he was in a condition to originate an idea, or to discover an old one. "I think he is of that

unusual high type that he rather disregards money, and under those distressing circumstances I don't believe he would be liable to think about the money side or remuneration that he might obtain. I think this attitude principally came from his grief or the effects of grieving over the accident plus the natural tendency of Mr. Mewborn. To be frank, Mr. Mewborn is a very unusual man. He is not the type that thinks much of the money side. He lives in a rather high thought. That type of mind is not liable to think about money and material matters under these circumstances."

Plaintiff's partner testified: "He was very much grieved all the time, and some time after Palmer Mewborn's death; he did not seem to have his mind on his business at the store or farm. I looked after the store, but he did not seem to have his mind on the farm, but all on this boy."

The defendant, in reply, offered evidence tending to show that the plaintiff "went about his usual duties except he appeared to be sometimes thinking of things and was grieved over the accident."

Mrs. Mewborn testified: "I certainly did not consider my husband crazy at that time, nor do I now."

Upon denial of liability and issues joined, there was a verdict and judgment for the plaintiff, from which the defendant appeals, assigning errors.

Dawson & Jones for plaintiff.
C. H. Gover for defendant, appellant.

STACY, C. J., after stating the case: The accident occurred 28 June, 1925; the extent of the injury was not known until 8 August following; written notice was given to the defendant 12 September thereafter; Was this a sufficient compliance with "Condition C" of the policy, requiring immediate written notice of the accident, under all the facts and circumstances disclosed by the record? We think the evidence was such as to carry the question to the jury.

The trial court was correct in refusing to hold, as a matter of law, that the notice was not given as soon as reasonably practicable under the circumstances, or without unnecessary delay, and in submitting the question to the jury to determine whether the plaintiff had acted with reasonable promptness in the matter. The expression "immediate written notice," as used in the policy, we apprehend, was intended to impose upon the plaintiff the exercise of reasonable diligence in giving the required notice, which, under the apparent weight of authority, should be measured by his ability and opportunity to act in the premises. *Carey v. Farmers, etc., Ins. Co.,* 27 Or., 146, 40 Pac., 91; *Rhyne v. Ins. Co.,* 196 N. C., 717, 147 S. E., 6.

The following from the opinion of the Supreme Court of New Hampshire in the case of *Ward v. Md. Cas. Co.,* 41 Atl., 900, has been approved by the Supreme Court of the United States *(Fidelity & Deposit Co. v. Courtney,* 186 U. S., 342), and in many jurisdictions, as the proper construction of such a provision in a contract of insurance:

"The defendants' liability depends in part upon the answer to the question whether the plaintiffs gave them 'immediate' notice in writing of O'Connell's accident, the claim made on account of it, and the suit that was brought to enforce the claim. This involves an ascertainment of the meaning of the word 'immediate' as used in the policy. The word, when relating to time, is defined in the Century Dictionary as follows: 'Without any time intervening; without any delay; present; instant; often used, like similar absolute expressions, with less strictness than the literal meaning requires—as an immediate answer.' It is evident that the word was not used in this contract in its literal sense. It would generally be impossible to give notice in writing of a fact the instant it occurred. It cannot be presumed that the parties intended to introduce into the contract a provision that would render the contract nugatory. As 'immediate' was understood by them, it allowed the intervention of a period of time between the occurrence of the fact and the giving of notice more or less lengthy according to the circumstances. The object of the notice was one of the circumstances to be considered. If it was to enable the defendants to take steps for their protection that must necessarily be taken soon after the occurrence of the fact of which notice was to be given, a briefer time would be required to render the notice immediate according to the understanding of the parties than would be required if the object could be equally well attained after considerable delay. For example, a delay of weeks in giving notice of the commencement of the employee's suit might not prejudice the defendants in preparing for a defense of the action, while a much shorter delay in giving notice of the accident might prevent them from ascertaining the truth about it. The parties intended by the language used that the notice in each case should be given so soon after the fact transpired that, in view of all the circumstances, it would be reasonably immediate. If a notice is given 'with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay,' it will answer the requirements of the contract. . . . Whether the notices were reasonably immediate—like the kindred question of what is a reasonable time—are questions of fact that must be determined in the Superior Court."

Speaking to the subject in *Harden v. Ins. Co.,* 164 Mass., 382, it was said by *Morton, J.,* delivering the opinion of the Court: "Whether the

statement was 'forthwith rendered' depended on whether, taking all of these circumstances and considerations into account, the plaintiff used due and reasonable diligence. If he did, then it was 'forthwith rendered,' within the fair meaning of the policy; and whether he did or did not was a question of fact for the jury."

Again, in *Woodman Accident Assn. v. Pratt,* 62 Neb., 673, 87 N. W., 546, *Holcomb, J.,* after a full review of the authorities, says: "In respect of the rule of construing provisions in a contract of insurance for notice of accident and injury or loss or damage and proof of the same to be given 'forthwith' or 'immediately' or within a stipulated time, the authorities are not entirely harmonious, and yet from the examination we have been able to make in the limited time at our command the great weight of authority is to the effect that the exercise of due diligence and reasonable effort on the part of the insured to meet the requirements thus imposed, to be determined under all the circumstances as disclosed in each individual case, is deemed a compliance with such provisions although not within the time according to the strict letter of the terms used in defining the same."

It may be conceded that the decisions on the subject are variant, some holding that "as a man consents to bind himself, so shall he be bound" according to the literal meaning of the terms used in the contract, while others seemingly take a more liberal view of what the parties really intended, look with disfavor upon forfeitures, and sustain a recovery even in the face of a failure strictly to comply with the requirements of notice, where the notice given complies substantially with the spirit and meaning of the contract. 14 R. C. L., 1333. With this latter view, our own decisions are in full accord. *Allgood v. Ins. Co.,* 186 N. C., 415, 119 S. E., 561; *Grabbs v. Ins. Co.,* 125 N. C., 389, 34 S. E., 503.

It should be observed, perhaps, that we are not now dealing with a provision requiring something to be done before loss or injury, such as the payment of premiums at a stipulated time, or observing conditions which affect the nature and desirability of the risk. Such stipulations are usually regarded as of the essence of the contract, and on their compliance depends the life and success of the insurance company. *Clifton v. Ins. Co.,* 168 N. C., 499, 84 S. E., 817. It is also conceded that there is a reasonable basis and valid cause for inserting the present stipulation in the contract. But the risk assumed has neither been increased, nor the rights of the defendant jeopardized, by the delay of the plaintiff in giving notice of the injury. We are not, therefore, disposed to adopt a hard-and-fast rule which would relieve the defendant from liability, voluntarily assumed on its part for a consideration, and deny to the plaintiff all right of recovery.

There was nothing said in *Peeler v. Casualty Co.*, 197 N. C., 286, which, when properly interpreted, militates in any way against our present position.

While the case is not altogether free from difficulty, we have concluded that, on the whole record, the verdict and judgment should be upheld.

No error.

BROGDEN, J., dissents.

STELLA REDMON v. DR. FRANK ROBERTS ET AL.

(Filed 30 December, 1929.)

1. Bastards B b—Contract of father to support illegitimate child is valid and enforceable.

A contract made by the father of an illegitimate child with the mother thereof for support and maintenance of such child is not contrary to public policy, but is a valid and enforceable agreement supported by sufficient consideration.

2. Wills B b—In this case held: Statute of Frauds could not be pleaded by defendant in action for breach of contract to devise.

Where the father of an illegitimate child contracts with its mother to devise to such child a share of his estate equal to the share of his legitimate children, and in consideration thereof the mother gives up the custody of the child and forbears to take legal action against him, in an action by such child to recover damages against the estate of the deceased father for breach of the contract to devise: *Held*, the contract was supported by sufficient consideration, and the deceased father having received the benefits of the contract his personal representative will not be allowed to plead the Statute of Frauds.

3. Appeal and Error J g—Where plaintiff may recover on one aspect of case consideration of another is unnecessary on appeal.

Where by a liberal construction of the allegation of the complaint the relief sought is based on breach of an oral contract to adopt and the breach of an oral contract to give the plaintiff an equal share of the intestate's property, and the plaintiff can recover on the contract to devise, on appeal it is unnecessary to discuss the effect of the oral contract to adopt.

4. Appeal and Error F a—Where exceptions are not taken in trial court discussion of alleged error will not be considered on appeal.

Where the charge of the Superior Court judge is not excepted to upon the issue of the measure of damages, the discussion in appellant's brief upon the subject will not be considered on appeal. *Semble:* Where the

consideration for an oral contract to devise lands cannot be measured by pecuniary standards, the measure of damages for its breach is ordinarily fixed by the standard adopted by the parties to the contract, or the value of the property agreed to be devised.

CIVIL ACTION, before *Johnson, Special Judge,* at May Term, 1929, of MADISON.

The plaintiff is an illegitimate daughter of J. F. Redmon, who died intestate on or about 24 April, 1928. The defendants are the administrator, widow, and heirs at law of the deceased.

The evidence tends to show that the deceased in his early manhood was intimate with the mother of plaintiff, who was then a young girl. The evidence further tends to show that the deceased made a contract with the mother "that if I wouldn't bring suit against him or have my brothers bring suit against him, that he would take Stella . . . as his child, give her his name, and just as soon as he was financially able that we would get married. I agreed to that." Thereafter the deceased informed plaintiff's mother that he was intending to marry some one else, and that thereupon the deceased agreed with the mother of plaintiff that "he would take her in his own home after he was married, and he would give her his name and leave her equal part of anything he had equal with any children he had. I agreed with Mr. Redmon if he would take her and raise her as his child, and give her a share of property, that I would not bring suit against him or allow my brothers to bring suit against him." Thereafter the mother of plaintiff married and moved away to a distant state, and the plaintiff went to the home of the deceased and lived in his home as one of this children, took the name of the deceased, and was sent to school by him and cared for by him as one of his own children. At the time of his death the deceased left a wife and seven children.

There was evidence tending to show the value of the estate of intestate.

The following issues were submitted to the jury:

1. "Is the plaintiff the illegitimate child of defendants' intestate, J. F. Redmon, as alleged in the complaint?"

2. "Is Stella Redmon the illegitimate child of her mother, Stella Kate Haynie?"

3. "Did the defendants' intestate, J. F. Redmon, in consideration of an agreement on the part of the plaintiff's mother not to take legal action against the defendants' intestate on account of seduction or bastardy, contract and agree with the mother of the plaintiff, to leave to the plaintiff at his death, a share of his estate equal in value, to that left to each of his other children, as alleged in the complaint?"

4. "Did the defendants' intestate, J. F. Redmon, in consideration of the plaintiff's mother turning over the custody and control of plaintiff to the defendants' intestate, contract and agree with the mother of the plaintiff, to leave to the plaintiff at his death, a share of his estate equal in value to that left to each of his other children, as alleged in the complaint?"

5. "If so, did the defendants' intestate breach his contract, as alleged in the complaint?"

6. "Did the defendants' intestate, during his lifetime, legally adopt the plaintiff, Stella Redmon?"

7. "What damages, if any, is the plaintiff entitled to recover of the defendants?"

The jury answered the first five issues "Yes," the sixth issue, "No," and the seventh issue, "$6,000."

The record shows the following entries: "After the coming in of the verdict in the above-entitled case, the plaintiff moved for judgment on the verdict. This motion was denied for the reason, and only for the reason, that the undersigned judge was of the opinion that, as a matter of law, upon all the evidence, the plaintiff was not entitled to recover."

Thereupon judgment was entered setting aside the verdict as a matter of law and not as a matter of discretion.

From judgment rendered plaintiff appealed.

R. R. Williams, Carl R. Stuart and C. B. Mashburn for plaintiff.
John A. Hendricks and G. V. Roberts for defendants.

BROGDEN, J. Can an illegitimate child maintain an action against the estate of the deceased father, upon a contract made by the father with the mother, to the effect that the father would take the child into his own family and at his death give such child an equal share in his estate with his legitimate children?

Certain aspects of the question have been considered by this Court in *Thayer v. Thayer,* 189 N. C., 502, 127 S. E., 553. It is clearly established in this State that a contract made by the father of an illegitimate child with the mother thereof for support and maintenance of such child, is not contrary to public policy, but is a valid and enforceable agreement supported by sufficient consideration, *Hyatt v. McCoy,* 195 N. C., 762, 143 S. E., 518.

However, the defendants contend that the plaintiff cannot recover because the contract alleged and proven constituted either an agreement to adopt or to devise real property. Hence, if the contract sued on was merely an agreement to adopt, then no recovery lies for the reason

that adoption is the creature of statute and strict compliance therewith is essential to establish the relationship of parent and child. *Truelove v. Parker,* 191 N. C., 430, 132 S. E., 295. Moreover, if the cause of action be based upon an agreement to devise real property, then the contract is unenforceable by reason of the application of the statute of frauds, it being admitted that the contract between the parties was entirely oral.

The complaint sets forth two theories as a basis of the action. It is alleged: "That shortly before the said J. F. Redmon married the defendant, Virginia Lee Redmon, he came to see plaintiff's mother and assured her again that the said marriage in no way would interfere with the rights of this plaintiff, and that he would adopt this plaintiff as his own child and care for her and nourish her and educate her and leave to her the same share in the estate of said J. F. Redmon that any other child would have." Again in paragraph 10 of the complaint, it is alleged "that on several occasions thereafter the said J. F. Redmon assured the plaintiff's mother that he would leave to the plaintiff the same share in his estate that any other child of his might get, and that the plaintiff should share in his estate equally with all other children of said J. F. Redmon." The prayer for relief is to the effect that plaintiff be "adjudged to be the adopted child of said J. F. Redmon, deceased," and that "she have and recover . . . a sum of money equivalent to the value of a child's share in all of the estate . . . of which the said J. F. Redmon died seized and possessed."

A liberal construction of the allegations of the complaint discloses that the relief sought was not based entirely upon the breach of a contract to adopt plaintiff, but also upon the breach of contract to give the plaintiff an equal share of the intestate's property. Therefore, we deem it unnecessary to discuss the effect of an oral contract of adoption.

This Court and the Courts generally have upheld and enforced oral contracts to devise or convey land in consideration of services rendered. *Whetstine v. Wilson,* 104 N. C., 385, 10 S. E., 471; *Lipe v. Houck,* 128 N. C., 115, 38 S. E., 297; *Faircloth v. Kenlaw,* 165 N. C., 228, 81 S. E., 299; *McCurry v. Purgason,* 170 N. C., 463, 87 S. E., 224; *Deal v. Wilson,* 178 N. C., 600, 101 S. E., 205; *Brown v. Williams,* 196 N. C., 247, 145 S. E., 233; *Doty v. Doty,* 2 L. R. A. (N. S.), 713; *Broughton v. Broughton,* 262 S. W., 1089; *Bowling v. Bowling's Admr.,* 300 S. W., 876. The theory upon which the reason is based, is that the party breaching the contract has received the benefit thereof, and that it would be an act of bad faith to plead the statute of frauds as a bar to recovery. This principle was declared in *Deal v. Wilson, supra,* as follows: "We there said that where the defendant has promised, in con-

sideration of services to be rendered, that he will transfer to the plaintiff certain property, which he afterwards refuses to do, and, instead of fulfilling his contract, sets up the statute of frauds as a bar to any recovery on the same, he acts in bad faith, and his conduct having deceived the plaintiff, who, relying upon the assurance that the contract would faithfully be performed, had been induced to part with his money or to render services of value to the defendant, the latter may recover compensation for the loss he has sustained."

We can perceive no logical distinction, in principle, between rendering services to a decedent and foregoing the assertion of a legal right. In the case at bar, the mother of plaintiff had a right to institute an action against the deceased for damages, and she was entitled to the custody of her minor daughter. She surrendered both of these rights to the intestate in consideration of the agreement to give the plaintiff an equal share of his property. In contemplation of the law, this was sufficient consideration to support the agreement and the consideration was received by the defendant. Plaintiff's mother instituted no action and did not attempt to withhold the custody of her minor daughter. Hence, her part of the agreement was fully and completely performed, and we are therefore of the opinion that the plaintiff is entitled to recover.

The measure of damages is discussed in the brief of defendants, but the record discloses that there was no exception to the charge of the trial judge upon the measure of damages, and hence that question is not before us. However, in the case of *Bowling v. Bowling, supra,* the facts are almost identical with those in the case at bar. The Kentucky Court says: "The general rule is that an oral agreement to devise real estate to another is within the statute of frauds and cannot be enforced, but where the benefit to intestate cannot be measured in money, there is no way to determine the amount of recovery except by the pecuniary standard fixed by the parties to the contract. The measure of damages for the breach of contract to devise is the value of the property agreed to be devised."

We hold that the plaintiff is entitled to judgment upon the verdict, and that the trial judge committed error in setting aside the verdict as a matter of law.

Error.

PITTSBURGH PLATE GLASS COMPANY, INC., v. HOTEL CORPORATION ET AL.

(Filed 30 December, 1929.)

Insurance K b—Retention of premium until issue of fraud can be determined is not waiver of right to avoid contract for the fraud.

The surety on the bond of a contractor for the erection of a building does not necessarily waive his right to avoid the contract for fraud by retaining the premium paid to it during the litigation until the alleged fraudulent procurement of the bond can be determined.

APPEAL by plaintiff from *Grady, J.*, at May Term, 1929, of NEW HANOVER.

Civil action to recover for materials furnished by plaintiff and used by the contractor in building the Cape Fear Hotel in the city of Wilmington.

Upon denial of liability by the bonding company, and issues joined, the jury returned the following verdict:

"1. Was the execution of the bond of 2 November, 1923, on the part of the Fidelity and Deposit Company of Maryland, procured by false and fraudulent representations, or the fraudulent concealment of facts on the part of Walter Clark, as alleged in the answer of said Surety Company? Answer: Yes.

"2. If so, did Miller & Company have knowledge of, or participate in said fraudulent representations or concealment of facts as alleged in said answer? Answer: Yes.

"3. If there were such fraudulent representations or concealment of facts as alleged, did the Fidelity and Deposit Company of Maryland, after the discovery thereof, retain the premium, and hold and claim the benefit of the indemnity obligation of Broadfoot, as alleged by the complaint? Answer: Yes, by the court.

"4. If there were such fraudulent representations or concealment of facts, as alleged by the defendant, Surety Company, has said Surety Company, by its acts and conduct waived the same and ratified the contract or suretyship as alleged by the plaintiff? Answer: No, by the court.

"5. What amount is the plaintiff entitled to recover of the defendant, Fidelity and Deposit Company? Answer: ....."

From a judgment on the verdict, relieving the Fidelity and Deposit Company of Maryland from liability on its bond, but requiring a return of the premium paid thereon, the plaintiff appeals, assigning errors.

Bryan & Campbell, C. D. Hogue and Marsden Bellamy for plaintiff.

Isaac C. Wright and Rountree & Carr for defendant, Deposit Company.

PER CURIAM. This action was instituted 24 August, 1925. It has had many hearings in the Superior Court, and this is the third appeal here. Former appeals reported in 193 N. C., 769, and 197 N. C., 10.

A careful perusal of the record leaves us with the impression that the case has been tried substantially in accord with the principles of law applicable, and that the verdict and judgment should be upheld.

The trial court correctly ruled that in an action to recover on the contract it is not necessarily a waiver of the right of avoidance for a surety company, while defending said action, to retain the premium paid on the policy until its alleged fraudulent procurement can be determined. 14 R. C. L., 1193.

No error.

STATE v. OTIS TROGDON AND DWIGHT TROGDON.

(Filed 30 December, 1929.)

Criminal Law G c—Where defendant does not offer character evidence, evidence of his bad character affects only his credibility.

Where a defendant in a criminal action testifies in his own behalf, but offers no evidence as to his character, the State may offer evidence of his bad character, but such evidence affects only his credibility as a witness, and an instruction that such evidence might be taken as substantive evidence of guilt will be held for reversible error.

CRIMINAL ACTION, before *MacRae, Special Judge,* at April Special Term, 1929, of RANDOLPH.

The defendants were indicted and convicted of secret assault with intent to kill. Each defendant was sentenced to serve a term of twenty years in the State prison.

From the judgment pronounced the defendants appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Hammer & Wilson and Moser & Barnes for defendants.

PER CURIAM. Neither of the defendants offered evidence as to his good character. The State, however, offered evidence of the bad character of defendants.

The trial judge charged the jury as follows: "The defendants took the stand in their behalf, and you may consider any evidence tending to show their character to be bad as substantive evidence; that is tending to indicate or show that they committed the acts with which they are charged. As to Mr. Myers and Mrs. Myers, testimony showing that

their character is good may be considered by you as affecting their credibility. Because a person's character is proven to be bad it should not always lead the jury to believe that person would swear falsely. The fact that a person's character is proven to be good neither does it follow from such testimony that that person would always speak the truth; but character evidence may be taken and weighed by the jury in connection with the credibility of the witness. And in case of defendants charged with a crime, where the defendants' character has been placed in issue, where the defendants take the stand have placed their character at issue, evidence tending to show that their character is bad is to be received by the jury, not only as relating to their credibility, but as substantive evidence, tending to show whether or not they committed the offense with which they are charged."

The foregoing instruction was erroneous, and the defendants are entitled to a new trial. *S. v. Idol,* 195 N. C., 497, 142 S. E., 588; *S. v. Mike Roberson,* 197 N. C., 657.

New trial.

STEPHEN BARNETT AND WIFE, SARAH BARNETT, v. JULIUS AMAKER ET AL.

(Filed 30 December, 1929.)

Adverse Possession A h—Evidence of adverse possession under color of title held sufficient to be submitted to the jury.

Where there is sufficient evidence of adverse possession under color of title, by those claiming under deeds from the grantee of the husband of lands owned by his deceased wife, the question of title is for the jury to determine, and their finding is conclusive.

CIVIL ACTION, before *Moore, J.,* at May Term, 1929, of GUILFORD.

On 16 October, 1889, Judith Mendenhall, executrix of C. P. Mendenhall, conveyed a certain tract of land in Guilford County to Aaron Barnett. Prior to 21 July, 1903, Sarah Barnett, daughter of Aaron Barnett, married William Cosby. On 21 July, 1903, Aaron Barnett conveyed the land in controversy to his daughter, Sarah Cosby. Sarah Cosby died intestate and without issue prior to 1907. In 1907 William Cosby married a widow, who had a son by a former marriage, who is designated in the record as George Cosby. After the death of Sarah Cosby, William Cosby remained in possession of the land until his second marriage in 1907, and thereafter remained in possession until the house upon the land was burned. On 25 March, 1918, William Cosby conveyed the land to his step-son, George Cosby. On 3 July,

1926, George Cosby conveyed the land to the defendant, Julius Amaker. The plaintiffs are the heirs at law of Aaron Barnett. Certain of the heirs at law of Aaron Barnett conveyed their interest in the land to Schiffman, and on 15 June, 1928, Schiffman and other heirs at law of Aaron Barnett conveyed the land to the plaintiffs, Stephen Barnett and his wife. Stephen Barnett is a son of Aaron Barnett. Suit was instituted on 25 June, 1928.

The plaintiffs claim the land in controversy as heirs at law of Aaron Barnett, deceased. The defendants claim the land under the deeds from William Cosby and George Cosby, which they allege constitute color of title, and that, while William Cosby had no right to convey the land of his deceased wife, the Cosbys acquired title by adverse possession under color of title.

The verdict of the jury established the fact that the plaintiffs are not the owners of or entitled to the possession of the land. From judgment upon the verdict in favor of defendants, plaintiffs appeal.

Harry R. Stanley for plaintiffs.
Hoyle & Harris for defendants.

PER CURIAM. The merits of the case turn upon the question of possession under color of title. There was ample evidence to support and justify the verdict, and therefore the finding of the jury is conclusive. The plaintiffs assail the charge of the court with respect to tacking and rely upon the case of *Morrison v. Craven,* 120 N. C., 327, 26 S. E., 940. However, this case is not applicable to the facts disclosed by the record. *Vanderbilt v. Chapman,* 172 N. C., 809, 90 S. E., 993.

No error.

BANK OF CANTON AND TRUST COMPANY v. D. H. CLARK, TRADING AS CLARK CONSTRUCTION COMPANY, AND D. H. CLARK, INDIVIDUALLY.

(Filed 8 January, 1930.)

1. Banks and Banking C b—Bank officer does not have implied authority to use bank funds for personal liability.

The cashier of a bank has no implied authority to use the funds of the bank for his personal or private use, and an agreement between him and another that such other should give his note to the bank for an amount due him by the cashier and that the cashier would pay it upon maturity is not binding upon the bank in the absence of authorization by its board of directors. C. S., 221(n).

2. Same—One dealing with bank officer is put upon inquiry as to his authority to use bank funds for personal liability.

Where one enters into an agreement with an officer of a bank whereby the officer was to use the bank's funds for the payment of a personal debt, he is put upon inquiry as to the authority of such officer to make the agreement, or whether the governing body of the bank had given its sanction thereto.

3. Same—Question of whether bank was estopped from denying authority of cashier to use bank funds for personal debt held for the jury.

Where the contractor for the erection of a residence for the cashier of a bank has given his note to the bank for the amount due him by cashier, with the understanding that the cashier was to pay it upon maturity, and there is evidence that the contractor inquired at the bank several times and was informed that the note had been paid, when in fact it had been kept by the bank and used by it as collateral, the question is for the jury as to whether the bank in its suit on the note is estopped to set up the fact that the note had not been paid, or deny the cashier's authority to enter the agreement, there being further evidence that thus lulled into feeling secure the contractor had lost his right of statutory lien upon the residence erected for the cashier.

4. Estoppel C a—Application of doctrine of estoppel by misrepresentation.

Estoppel by misrepresentation differs from estoppel by record, by deed, or by contract, in that it is not mutual, but applies when the representation of a material fact is false and should have been known as such to the party making it, and was calculated to, and did deceive another, causing him to suffer loss.

5. Principal and Agent A c—Person first reposing confidence in agent must suffer loss by his wrongful acts.

Where one of two innocent persons must suffer by the fraud or deceit of another, he who first reposes the confidence must bear the loss.

APPEAL by defendant from *Schenck, J.*, at September Term, 1929, of HAYWOOD. New trial.

S. M. Robinson and T. A. Clark for plaintiff.
Morgan, Ward & Stamey for defendant.

ADAMS, J. The defendant Clark was a contractor doing business under the name of the Clark Construction Company. On 9 June, 1925, he executed for the Clark Construction Company a promissory note under seal in the sum of $1,700, payable on demand to his own order, with interest at the rate of six per cent per annum. Presentment, protest, notice of protest and of nonpayment, and all defenses growing out of an extension of time were waived on behalf of the maker and endorser. After writing his name on the back of it the defendant delivered the instrument to the plaintiff's cashier and was given credit on his

bank account for the face of the note. More than two years afterwards the plaintiff brought suit, and upon the trial the controversy came down to the single issue of the defendant's indebtedness: "What amount, if any, is the plaintiff entitled to recover of the defendant?" In reference to the issue the judge gave the jury this instruction: "If you find the facts to be as shown by all the evidence, your answer will be $1,700, with interest from 9 October, 1927." The jury returned a verdict and the plaintiff recovered a judgment for this amount, and the defendant appealed upon exceptions formally entered of record. The decisive question is whether there was error in the instruction.

When the transactions between the parties took place the plaintiff's cashier was W. R. Palmer. He had been cashier for the three years next preceding; he continued his service in this capacity for two years after the note was executed. During this period Frank Mease was the vice-president and had active charge of the bank; but both Mease and Palmer made loans without consulting any person connected with the institution. Palmer testified that he left the bank in November, 1927, and Mease in the preceding July, and that each of them repeatedly falsified the records intrusted to their keeping.

There is evidence that Palmer and the defendant, some time before the note was made, entered into a contract to this effect: The defendant for $4,100 was to build a house in Canton for Palmer; the defendant was to draw checks on the plaintiff from time to time to pay for building material, labor, and incidental outlays, and Palmer was to deposit in the bank to the credit of the defendant such sums as were necessary to protect these checks. Palmer made two such deposits of $500 each; but after the defendant had drawn his checks on the plaintiff, for the purposes specified, in sums aggregating $1,500 or more, Palmer found it impossible to deposit an amount sufficient to pay them, and requested the defendant to execute the note in suit. The defendant testified that the note was delivered to Palmer under an agreement between Mease, Palmer and himself that Palmer was to take up the checks and pay the note and that the defendant "was not to pay the note to the bank."

There is evidence that some time after this agreement was made the defendant demanded a return of the note; that Palmer told him "it had been taken care of," and Mease, that it had been paid; that Mease made the latter statement more than a half dozen times; and that by reason of these misrepresentations the defendant was lulled into security, led into giving Palmer credit for $1,700, and deprived of his statutory lien on Palmer's house. It was the defendant's contention that the time for filing his lien had not expired when the plaintiff's officers gave him these assurances, and that the lien would have been filed if he had not been misled by their deceit. Palmer admitted that he was due the de-

fendant $1,700, and that he had made payments of interest and had procured renewals of the note. The defendant neither paid interest nor at any time sought a renewal of the paper.

When he delivered the instrument bearing his endorsement to the plaintiff's cashier and was given a credit of $1,700 on his account, the defendant became liable to the bank, nothing else appearing, for the full amount of the obligation; and the alleged agreement between him and the cashier did not alter the situation or affect his liability. There are two phases of the evidence in which this statement may be considered. When the note was executed the defendant had on deposit with the plaintiff a balance of $2.63; he had drawn thirty-eight checks, for the protection of which, upon the cashier's failure to perform his alleged agreement, the note was requested and his credit of $1,700 was extended. These checks were overdrafts for which the defendant was liable, as he did not have the bank's permission to draw them. The bank owed him nothing above his small balance, and was under no obligation to honor his paper in excess of this amount. This is the law as declared upon similar facts in *Dowd v. Stephenson,* 105 N. C., 467. It is there held, in addition, that without the consent of the governing authority of a bank its officers have no right to appropriate any part of its funds to the payment of their personal debts. Palmer was utterly without authority to bind the plaintiff by diverting or appropriating its assets to the satisfaction of his individual wants. His official position clothed him with no implied authority to accomplish such purpose. He had no right to "absorb the funds" of the plaintiff in payment of his private debts. "No person can act as the agent of another in making a contract for himself." *Hier v. Miller,* 63 L. R. A., 952. Nor could the joint action of Mease and Palmer legally affect this result without the consent of the governing body. It was said in *Dowd v. Stephenson, supra,* that "in the absence of special authority for such purpose, neither the bank's president nor its cashier, nor these officers acting jointly, had authority or right to appropriate and devote any part of the funds of the bank to the payment of the president's personal debt due to the defendant. Such authority, ordinarily, was beyond the scope of the purpose and duties of such officers." Tiffany on Banks and Banking, 325; *Stansell v. Payne,* 189 N. C., 647; *Grady v. Bank,* 184 N. C., 158; *Bank v. West, ibid.,* 220; *Bank v. Lennon,* 170 N. C., 10; *Bank v. Wilson,* 124 N. C., 562, 568; C. S., 221(n).

The defendant knew the terms of the contract; he knew the cashier's interest in it was personal; and this knowledge charged him with the duty of inquiring into the actual extent of the cashier's authority. *Hier v. Miller, supra; Bank v. West, supra.* Under these circumstances he

cannot evade liability on his obligation by proof of "an understanding" with Mease and Palmer that he "was not to pay the note."

The trial judge no doubt had these principles in mind when he gave the peremptory instruction to which the appellant excepted. But there was material evidence which the instruction excludes. According to the testimony of the defendant he called for his note within a few days after the bank had received it and was told by the cashier and the vice-president that it had been taken care of or had been paid. The time for filing a lien on Palmer's house had not then expired. On various subsequent occasions the plaintiff's officers gave him similar assurances: the books, they said, showed no entry against the defendant or the note had been lost; at any rate, it had been paid. Paid by whom? Evidently by Palmer, not by the defendant; and if by Palmer the bank was satisfied and the defendant absolved. These assurances continued until it was too late for the defendant's lien. Meanwhile, the note had been in the service of the bank as collateral security and was next seen by the defendant in the year 1927.

These are some of the contentions of the defendant. He says the officers of the bank deceived him for the purpose of protecting the cashier, the consequence being his alleged liability on the note and his inability to file a lien or to collect anything for building the house. He insists that the governing authority of the bank cannot set up the collusion of its officers as an act *ultra vires,* because the bank as a result of the collusion retained the note as an asset and profited by its use.

There are allegations in the answer and evidence in the record upon which to rest the defendant's theory. If he can establish his contentions to the satisfaction of the jury he may thereby bar the plaintiff of a recovery on the note. He would then have a case to which the doctrine of estoppel by misrepresentation would be applicable. Estoppel of this nature differs from estoppel by record, by deed, and by contract. It is not based upon an agreement of the parties or upon a finding of fact which may not be disputed. It is not mutual, but applies to only one party. The fundamental principle is that a party may be estopped by the false representation of a material fact which he knew or should have known was calculated to deceive and which has deceived another and caused him to suffer loss. There are convincing reasons for denying the availability of the plaintiff's contention that the alleged misrepresentation was unauthorized: there is evidence that the bank derived benefit from the asserted deceit; moreover, where one of two persons must suffer by the fraud or deceit of another he who first reposes the confidence must bear the loss. *R. R. v. Kitchin,* 91 N. C., 39; *Bank v. Liles,* 197 N. C., 413. The appellant is entitled to a

New trial.

A. M. BENNETT v. PROVIDENT FIRE INSURANCE COMPANY, AND J. H. SAMPLE, TRUSTEE, v. PIEDMONT FIRE INSURANCE COMPANY OF CHARLOTTE, N. C.

(Filed 8 January, 1930.)

1. Insurance E b—Ambiguous insurance contract will be construed in favor of insured.

Where a policy of fire insurance is ambiguously expressed and capable of two reasonable interpretations, the interpretation more favorable to the insured will be adopted by the court.

2. Same—Insurance contract will be construed as a whole to effectuate the intent and purpose of the parties.

In construing a contract of fire insurance the courts are at liberty to consider the purpose of the contract in securing the interest of the mortgagee when that purpose necessarily and plainly appears from a perusal of the entire writing, and, where there are somewhat inconsistent provisions, that construction will be adopted which, while not giving effect to all provisions, will at the same time plainly tend to carry out the clear purpose and intent of the written instrument.

3. Insurance N c—In this case held: insurer of mortgagee liable for total loss, and not entitled to pro rate with insurer of mortgagor.

Where under the statutory standard form of a policy of fire insurance certain policies are taken out with a loss payable clause in favor of the mortgagee, with provision that no act or neglect of the owner with regard to the property shall invalidate the insurance as to the interest of the mortgagee, the evident intent of the policy is for the protection of the mortgagee, and where the owner has taken out other policies of insurance on the same property with other companies without the knowledge of the mortgagee, the company issuing the policy with the loss payable clause in favor of the mortgagee is not entitled to pro rate a loss thereunder with the other company, and is liable for the full amount of the loss.

APPEAL by defendant, Piedmont Fire Insurance Company of Charlotte, N. C., from *Finley, J.*, at August Term, 1929, of BUNCOMBE.

Civil actions by A. M. Bennett, owner, and J. H. Sample, trustee in deed of trust, to recover on different fire insurance policies issued on the same property, consolidated and tried together at the August Term, 1929, Buncombe Superior Court.

The action of J. H. Sample, trustee, is to recover on three policies of insurance, issued by the Piedmont Fire Insurance Company in the sum of $2,000 each, dated 2 April, 23 April and 21 May, 1927, respectively, and each containing a rider or New York Standard Mortgage clause, in favor of J. H. Sample, trustee, as mortgagee or trustee, as his interest may appear, the material provisions of said rider or standard mortgage clause being as follows:

"Loss or damage, if any, under this policy, shall be payable to J. H. Sample, as trustee, mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property. . . .

"In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise."

The action of A. M. Bennett is to recover on two policies of insurance, issued by the Provident Fire Insurance Company in the sums of $7,000, dated 25 May, 1927, and $2,000 dated 24 June, 1927, respectively, and neither containing a standard mortgage clause in favor of the trustee, or otherwise, but both covering only the interest of the owner. Said policies were issued without the knowledge or consent of J. H. Sample, trustee.

On 13 January, 1928, while all the policies were in force, the property, worth at that time $9,691.93, was damaged by fire to the extent, as fixed by agreement of the parties, of $2,936.95.

From a judgment against the Piedmont Fire Insurance Company in favor of J. H. Sample, trustee, for the full amount of the loss, and denying to A. M. Bennett any right of recovery as against the Provident Fire Insurance Company, the Piedmont Fire Insurance Company appeals, assigning errors.

W. B. Miller for plaintiff, Sample, trustee.

Brooks, Parker, Smith & Wharton for defendant, Provident Company.

Bourne, Parker & Jones for defendant, Piedmont Company.

STACY, C. J. The appeal presents, for the first time in this jurisdiction, the question as to whether the subsequent act of an owner or mortgagor in taking out additional insurance, without the knowledge or consent of the mortgagee, to protect alone his interest in mortgaged property, *ipso facto* reduces proportionately the amount of prior insurance held by a mortgagee or trustee on the same property under a New York Standard Mortgage Clause.

At least six courts have passed upon the question, two deciding it in the affirmative *(Hartford Fire Insurance Co. v. Williams,* 63 Fed., 925, *Sun Ins. Co. v. Varable,* 103 Ky., 758), and four in the negative *(Eddy*

v. London Assurance Corp., 143 N. Y., 311, *Hardy v. Lancashire Ins. Co.,* 166 Mass., 210, *Germania Fire Ins. Co. v. Bailey,* 19 Ariz., 580, *Martin v. Sun Ins. of London,* 83 Fla., 325).

The question was adverted to, but not decided, in *Bank v. Ins. Co.,* 187 N. C., 97, 121 S. E., 37, where it was held that the standard or union mortgage clause, engrafted upon a policy of insurance, operates as a distinct and independent contract of insurance for the separate benefit of the mortgagee, as his interest may appear, to the extent, at least, of not being invalidated, *pro tanto* or otherwise, by any act or omission on the part of the owner or mortgagor, unknown to the mortgagee.

It is provided by each of the standard mortgage clauses in question that the Piedmont Fire Insurance Company shall not be liable under its policies for a greater proportion of any loss or damage sustained thereunder than the amount of such insurance bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise. It is also provided in said standard mortgage clauses that the insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property.

Why these two apparently conflicting provisions should have been inserted in the same contract is not easy to perceive, but in keeping with the general rule of construction, with respect to ambiguously worded policies of insurance, where they are reasonably susceptible of two interpretations, we think the one more favorable to the assured should be adopted. *Underwood v. Ins. Co.,* 185 N. C., 538, 117 S. E., 790.

The clause in question received consideration by the New York Court of Appeals in the case of *Eddy v. London Assurance Corp., supra,* where *Peckham, J.,* delivering the opinion, said:

"It is clear that the only object of the mortgagee is to obtain a security upon which he can rely, and this object is, of course, also plain and clear to the insurer. Both parties proceed to enter into a contract with that one end in view. In order to make it plain beyond question the statement is made that no act or neglect of the owner with regard to the property shall invalidate the insurance of the mortgagee. When, in the face of such an agreement, entered into for the purpose stated, there is also placed in the instrument a provision as to the proportionate payment of a loss, we think the true meaning to be extracted from the whole instrument is that the insurance which shall diminish or impair the right of the mortgagee to recover for his loss is one which shall have been issued upon his interest in the property, or when he shall have consented to the

other insurance upon the owner's interest. This may not, perhaps, give full effect to the strict language of the apportionment clause, but if full effect be given to that clause, and it should be held to call for the consequent reduction of the liability of the insurers in such a case as this, then full effect is denied to the important and material, if not the controlling, clause in the contract, which provides that the insurance of the mortgagee shall not be injuriously 'impaired or affected' by the act or neglect of the owner. As used in these mortgagee clauses, this is the meaning of the word 'invalidate.' *(Hastings v. Ins. Co.,* 73 N. Y., at page 149).

"We must strive to give effect to all the provisions of the contract and to enforce the actual meaning of the parties to it as evidenced by all the language used within the four corners of the instrument. We are also at liberty to consider the purpose for which the contract was executed, where that purpose plainly and necessarily appears from a perusal of the whole paper. That construction will be adopted, in the case of somewhat inconsistent provisions, which, while giving some effect to all of them, will at the same time plainly tend to carry out the clear purpose of the agreement; that purpose which it is obvious all the parties thereto were cognizant of and intended by the agreement to further and to consummate."

Perceiving that the judgment below accords, in principle, with our own decisions and with the majority of cases elsewhere, we are inclined to approve it. With this disposition of the appeal, the remaining questions, sought to be presented, become academic.

No error.

ASHEVILLE SUPPLY AND FOUNDRY COMPANY v. CATAWBA CONSTRUCTION COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 8 January, 1930.)

Principal and Surety B a—In this case held: surety was liable to materialmen and defenses against owner were not available against them.

A surety bond given the owner for the construction of a road over his land will be construed with the contractor's bond given the owner, and where the surety expressly agrees to liability for all material used therein, and the bond expressly indemnifies them against loss for which they may recover against the surety under a contract made for their benefit, though they are not specifically named therein, and defenses of the surety which may be available against the owner are not available against such mate-

rialmen in their action to recover for material furnished by virtue of the contractual provisions in their behalf. *Peeler v. Casualty Co.*, 197 N. C., 286, cited and distinguished.

STACY, C. J., not sitting.

APPEAL by United States Fidelity and Guaranty Company from *Grady, J.*, at August Special Term, 1929, of HAYWOOD. No error.

Morgan, Ward & Stamey for plaintiff.
Harkins & Van Winkle for appellant.

ADAMS, J. On 26 April, 1926, the Catawba Construction Company, Inc., and J. D. Hood, trustee, entered into a written contract by the terms of which the Construction Company was to grade and build on Hood's property a highway or road between a designated place near Balsam and a place on Balsam Mountain known as Yellow Face Knob. The terms and specifications were set out in the contract. The Construction Company as principal and the United States Fidelity and Guaranty Company, as surety, executed a bond on 24 April, 1926, payable to Hood, trustee, in the penal sum of $20,000 to secure the company's performance of its contract. The material parts of the bond will be referred to hereafter. The Construction Company in part built, but did not complete a road five miles and a half in length; and in the course of the work it purchased from the plaintiff quantities of Euloy pipe to be used in the construction of culverts. The total purchase price was $2,884.30, but a credit of $1,078.80 for returned pipe left due the plaintiff $1,805.50; and for this amount the plaintiff brought suit against the defendants. On the trial the appellant introduced in evidence the judgment roll in the case of Catawba Construction Company *v.* J. D. Hood, trustee, and others for the purpose of showing that Hood had made default in his payments and was then indebted in the sum of $38,693.23 to the Construction Company, which for this reason had been forced to leave the work unfinished. This record was the appellant's only evidence. The Construction Company filed no answer and of course offered no testimony. The appellant's motion for nonsuit was denied and the jury gave the plaintiff a verdict for $1,805.50 with interest from 30 June, 1926. To the court's refusal to dismiss the action and to the judgment rendered for the plaintiff the appellant excepted. These are the only assignments of error.

It is necessary only to advert to the provisions of section 2445 of the Consolidated Statutes, because they relate to the construction of public buildings by counties, cities, towns, and other municipal corporations. Reference to this section as enacted in 1913 (Public Laws 1913, ch. 150, sec. 2) was made by the Court in *McCausland v. Construction Co.*, 172

N. C., 708. It was there held that the terms of the contract and bond under consideration were confined strictly to the indemnity of the owner and that the bond did not contemplate the payment of a bill for materials which were used in the construction of a building. See *Clark v. Bonsal,* 157 N. C., 270; *Peacock v. Williams,* 98 N. C., 324. But several decisions were cited in which it is held that in case of guaranty bonds or written contracts of indemnity third persons interested and having claims, though not named, may maintain an action when it appears by "express stipulation or by fair and reasonable intendment that their rights and interests were contemplated and being provided for." And these decisions are not exclusively those in which the terms of the bond are prescribed by statute. This Court has often had occasion to apply the principle that a person who is the beneficiary of a contract, though not a party or privy, is entitled to maintain an action for its breach. One who furnishes material for a building, even if not named in the contract between the owner and the builder, may bring suit on the contractor's bond and recover if the bond provides in express terms for liability to such person or for payment by the contractor of claims of this kind. *McCausland v. Construction Co., supra; Gorrell v. Water Supply Co.,* 124 N. C., 328; *Gastonia v. Engineering Co.,* 131 N. C., 363; *Supply Co. v. Lumber Co.,* 160 N. C., 428; *Morton v. Water Co.,* 168 N. C., 582; *Plyler v. Elliott,* 191 N. C., 54; *Glass Co. v. Fidelity Co.,* 193 N. C., 769.

By an application of these principles to the contract in question it is made clear that the appellant's exceptions should be overruled. The contract and bond must be construed together. *Manufacturing Co. v. Andrews,* 165 N. C., 285. In the former the contractor agreed to pay for the materials he purchased, and in the latter he not only agreed to pay all claims of materialmen; he stipulated that "this bond shall be for the benefit of the materialmen and laborers having a just claim, as well as for J. D. Hood, trustee." By virtue of these provisions the claim of the plaintiffs is not subject to the defenses available to the surety against Hood, the promisee and owner of the property. *Peeler v. Casualty Co.,* 197 N. C., 286, is easily to be distinguished. We find

No error.

STACY, C. J., not sitting.

IDA BONAPART v. W. M. NISSEN, FRANK L. BLUM & COMPANY, AND THE CITY OF WINSTON-SALEM.

(Filed 8 January, 1930.)

1. Municipal Corporations E e; Negligence A c—Evidence of joint negligence of city and another resulting in injury from falling wall held sufficient.

Where there is evidence tending to show that the private owner of a building left part of the building wall standing in an unsafe condition after the building had been condemned by the city building inspector, and that the city had constructed a retaining wall contiguous thereto, but had failed to construct weep holes therein so that the waters from the lands of the private owner were ponded back on his lands and seeped through the ground and sobbed and softened the foundations on the building wall so that after a heavy rain it fell over into the city market place and injured the plaintiff: *Held*, the evidence discloses joint negligence on the part of the city and the private owner, and the injury therefrom could have been reasonably anticipated, and is sufficient to sustain the verdict of the jury against them as joint *tort-feasors*, and that there was no primary and secondary liability between them, and defendants' motion as of nonsuit was properly denied. C. S., 567.

2. Trial E g—Error in explaining law in stating contentions of parties held not reversible, construing the charge as a whole.

Where in an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendants, the judge in his charge to the jury states the respective contentions of the parties, and then correctly charges the law arising from the evidence in the case, construing the charge as a whole it will not be held as reversible error that in his statement of the contentions of the parties he did not refer to the element of proximate cause, having given it in his charge as to the law.

APPEAL by defendants from *Lyon, J.*, and a jury, at June Term, 1929, of FORSYTH. No error.

This is an action for actionable negligence brought by plaintiff against defendants for injuries received.

The facts: W. M. Nissen is the owner of a lot in the city of Winston, in the rear of Nissen's lot is the Winston-Salem market. The Nissen lot is higher than the market lot. The natural flow of water from the Nissen lot was originally on the market lot. In 1925 the city excavated its lot and constructed a concrete retaining wall about 420 feet long which runs from 4 feet in height to a maximum of 10 feet and back to 7 feet at the other end. The concrete wall is about 7 feet high at the south end and 8 feet at the north end of the *Nissen property*. The natural earth is about 12 inches above and close to the top of the concrete wall, as it extends along the rear of the Nissen lot. The concrete wall varies in thickness, in the rear of the Nissen property it is 21

inches thick. It was in evidence that the foundation of the Nissen brick wall was below, some 8 inches or a foot, the top of the concrete wall.

C. S., 2773, 2774 and 2776, make provision that the local inspector of the municipalities of over 1,000 inhabitants can, when it appears that a building is especially dangerous condemn same—"shall be held to be unsafe"—and punishment is fixed for allowing unsafe buildings to stand after certain notice. About the first of July, 1928, the inspector condemned the west wall of the Nissen building adjacent to the city market, and recommended to the owner to make it safe or tear it down. After the owner was notified, he had the defendants Frank L. Blum & Company to do the work. After it was torn down, the building inspector refused to allow it built back on the portion of wall which was left as the foundation was "too bad to build on." There was evidence to the effect that Blum & Company were agents of Nissen and not independent contractors of W. M. Nissen and had done the work with due care. The Nissen wall adjacent to the market was torn down to the level of the concrete floor and the remaining part of the wall, which was 8 or 9 feet in height, was left standing for sometime.

The retaining wall, built by the city, adjoining the Nissen property, was built without any reinforcing steel, without any tie rods, and without weep holes. Sometime after it was erected it cracked and began to lean or bulge at the top. To remedy this the city drilled weep holes in the wall for the purpose of releasing any accumulation of water from behind it and at certain points put in tie rods to keep the wall from moving or bulging any further. Into the space left between the wall after it had moved and the dirt from which it had moved the city filled with rock. During the forty-nine hours immediately preceding the time the wall fell there was a rainfall in Winston-Salem of 5.46 inches, which was the heaviest rainfall that had been recorded in Winston-Salem during 6 years. The city used the property adjacent to the Nissen property for market purposes.

After the wall was built, it was in evidence that water collected between the concrete retaining wall and the wall of the Nissen building and caused the concrete retaining wall to move westwardly a few inches immediately west of the Nissen property which it was in evidence affected the foundation of the Nissen wall. The building of the concrete wall without sufficient weep holes, it was in evidence, caused the water from the heavy rains which fell during the forty-nine hours immediately preceding the disaster to pond back of the concrete retaining wall, and it was in evidence in this way the earth was softened and the foundation under the Nissen wall was injured and damaged. The wall of the Nissen building left standing for some time, on August 11, 1928, fell over the

concrete wall into the market place, a curb market, on plaintiff when she was there for the purpose of purchasing produce and seriously injured her, for which this action is instituted.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, W. M. Nissen, as alleged in the complaint? Answer: Yes.

"2. Was the plaintiff injured by reason of the negligence of the defendant, Frank L. Blum & Company, as alleged in the complaint? Answer: No.

"3. Was the plaintiff injured by reason of the negligence of the defendant, city of Winston-Salem, as alleged in the complaint? Answer: Yes.

"4. Was the negligence of W. M. Nissen primary and that of the city of Winston-Salem secondary? Answer: No.

"5. Was the negligence of Frank L. Blum & Company primary and that of the city of Winston-Salem, secondary? Answer: .....

"6. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $3,500."

The defendants made numerous exceptions, assignments of error and appealed to the Supreme Court.

J. M. Wells, Jr., and John C. Wallace for plaintiff.
Efird & Liipfert and Manly, Hendren & Womble for W. M. Nissen.
Parrish & Deal for city of Winston Salem.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence the defendants, W. M. Nissen and the city of Winston-Salem, made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error.

The jury having acquitted Blum & Company of any negligence, and there being also evidence to the effect that they were merely agents of W. M. Nissen, they are out of the picture. The jury found both W. M. Nissen and the city of Winston-Salem negligent as joint *tort-feasors* and there was evidence to sustain the finding. The jury further found that as between Nissen and the city of Winston-Salem there was no primary and secondary negligence or liability. No exception was taken to the issue. On the record, which is voluminous, we think there is ample evidence for the jury to find the joint negligence of Nissen and the city.

The natural drain from the Nissen property was on the city market property. The city dug down the bank and built a concrete retaining wall near to the building on the Nissen property.

The principle of law is stated thus in *Porter v. Durham,* 74 N. C., at p. 779. "It has been held that an owner of lower land is bound to receive upon it the surface water which falls on adjoining higher land, and which naturally flows on the lower land. Of course when the water reaches his land the lower owner can collect it in a ditch and carry it off to a proper outlet so that it will not damage him. He cannot however raise any dyke or barrier by which it will be intercepted and thrown back on the land of the higher owner. While the higher owner is entitled to this service, he cannot artificially increase the natural quantity of water, or change its natural manner of flow by collecting it in a ditch and discharging it upon the servient land at a different place, or in a different manner from its natural discharge." *Winchester v. Byers,* 196 N. C., at p. 384.

In reference to the reciprocal duty that Nissen and the city of Winston-Salem owed as adjoining property owners, we find in *Davis v. Summerfield,* 131 N. C., at p. 354 (see, also, 133 N. C., 325), the following: "The true rule deducible from the authorities seems to be that, while the adjacent proprietor cannot impair the lateral support of the soil in its natural condition, but is not required to give support to the artificial burden of a wall or building superimposed upon the soil, yet he must not dig in a negligent manner to the injury of that wall or building, and it is negligence to excavate by the side of the neighbor's wall, and especially to excavate deeper than the foundation of that wall, without giving the owner of the wall notice of that intention, that he may underpin or shore his wall, or relieve it of any extra weight on the floors, and the excavating party should dig out the soil in sections at a time so as to give the owner of the building opportunity to protect it and not expose the whole wall to pressure at once. The defendants did not give any notice of the nature of their proposed excavation, and the evidence justified the jury in finding them guilty of negligence."

It was the contention of plaintiff that the Nissen building after being condemned was partly torn down and a certain wall was left standing for sometime in an unsafe condition. The foundation was too bad to build on. It could be readily seen, if the standing wall fell, it would, as it did, fall over the city concrete retaining wall into the curb market where people assembled for trade. That it was the duty of the city to so build its concrete retaining wall adjoining the Nissen property that the natural drainage of water would not be thrown back on the Nissen property, the higher owner. That this was not done and that the retaining wall was defectively constructed and the water that naturally flowed from the Nissen property on the market lot had no sufficient

outlet, and owing to the heavy rains the water was ponded back of the concrete retaining wall of the city and sobbed and softened the earth and weakened the foundation of the Nissen wall, which was improperly built and made heavier by the wall being wet by the heavy rains, and these conditions caused the wall to fall. That both Nissen and the city of Winston-Salem failed to use due care under all the circumstances. That it could be reasonably anticipated that the particular injury or harm might follow the wrongful acts. *Hall v. Rinehart,* 192 N. C., 706. There was evidence to sustain these contentions and the jury found that they were jointly negligent. We think the verdict should be sustained and we find no prejudicial or reversible error in the record, as we will hereafter indicate.

There are various contentions made by both Nissen and the city of Winston-Salem, but we do not think they are material from the view we take of the case. Both Nissen and the city of Winston-Salem contend that a new trial should be granted on the following excerpt from the charge: "She contends, gentlemen of the jury, further, that each of the defendants had been guilty of actionable wrong, both collectively and separately, and that these wrongs caused the injuries she sustained. The plaintiff sets out a number of different allegations of actionable negligence. It is not necessary that they prove each of these acts of negligence for you to find that any or all of the defendants have been guilty of actionable wrong. (If you should find by the greater weight of the evidence that the plaintiff has proved a breach of duty of any one of the defendants to the plaintiff, then the proving of that one breach on behalf of any one of the defendants is sufficient for you to answer the issue as to negligence against that particular defendant Yes.)" We give the whole of this part of the charge—the exception is to the above portion of the charge in parenthesis. This excerpt was taken from that portion of the charge setting forth the contentions, and the defendants contend that this statement leaves out a fundamental principle that the negligence of the parties must be the proximate cause of the injury. This is axiomatic, but the court below was merely setting forth in the contentions the duties of the parties.

After setting forth fully the contentions of all the parties, the court said: "Gentlemen of the jury, these are the contentions of the respective parties. . . . The burden of these issues, that is the 1st, 2nd, 3rd and 6th issues, is on the plaintiff to satisfy you from the evidence and by the greater weight of the evidence that she is entitled to recover of each of these defendants. As I told you in the beginning, this action is based on the alleged negligence of the respective defendants, or any of them. Now, it is necessary for the jury to understand what negligence

is. Negligence is the failure to do that which a reasonably prudent man would ordinarily have done under the circumstances and the situation, or the omission to use means reasonably necessary to avoid or prevent injury to others. To establish actionable negligence the plaintiff is required to show by the greater weight of the evidence, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff at the time and under the circumstances in which they were placed, proper care being that degree of care which a prudent man should exercise ordinarily under like circumstances and charged with a like duty; and, second, it must appear that such negligent breach of duty was the proximate cause of the injury, the cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed."

"It is well settled that when there are conflicting instructions upon a material point, a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly." *Edwards v. R. R.,* 132 N. C., at p. 101. *May v. Grove,* 195 N. C., 235.

The excerpt from the charge complained of was in the contentions. The charge fully covered the law. The allegations of actionable negligence and the breach of duty set forth in the contentions are fully explained in the charge, what it consists of and negligence, and that it must be the proximate cause of the injury. We cannot see how the jury could have been misled and taking the contention with the charge on the law the matter is fully explained. If the contentions are strictly taken as a part of the charge and if we construe the contentions with the charge they are reasonably reconcilable. The charge should be considered as a whole. If the charge, as a whole, is correct, an expression standing alone, though technically incorrect is not reversible error. *Purnell v. R. R.,* 190 N. C., 573.

The record consists of 291 pages, which we have read with care. We have examined the assignments of error and authorities cited in the able briefs of defendants. We do not see any new or novel propositions of law. From a thorough examination of the record and authorities, we cannot find any reversible or prejudicial error.

No error.

P. L. THRELKELD AND J. B. CORY v. MALCRAGSON LAND CO., INC., BEVERLY HILLS, INC., ET AL.

(Filed 8 January, 1930.)

1. Lis Pendens A b—Quantity of land upon which notice of lis pendens may be filed.

One having the right to file notice of *lis pendens* upon lands of a certain acreage and description is not entitled to file *lis pendens* on a much larger acreage in which in a subsequent transaction of conveyance it has been included.

2. Mortgages C c—Registration determines priority of deeds of trust and mortgages—Fraud.

Where the grantor of lands claims a lien under a mortgage given for the balance of the purchase price, but has neglected to have it registered until the lands had been conveyed by registered mortgage, no notice, in the absence of fraud, can supply that of registration under our statute, C. S., 3309, and the purchase-money mortgage is subject to the prior registered incumbrance, and where the holder of the purchase-money mortgage does not allege that the subsequent mortgagee had notice of fraud and was not an innocent purchaser for value, his prayer to have his purchase-money mortgage declared a prior lien cannot be granted. C. S., 1009.

3. Lis Pendens A a—In this case held: action was not one affecting title to realty, and judgment canceling notice of lis pendens was proper.

Where the mortgagee of lands brings an action to recover on the note secured by the mortgage and to set aside a deed of the mortgagor, but not to foreclose the mortgage, the action is not one affecting the title to land within the meaning of C. S., 500, and the judgment of the lower court canceling and removing the notice of *lis pendens* from the records will be affirmed on appeal.

APPEAL by plaintiffs from *Sinclair, J.*, at Special August Term, 1929, of BUNCOMBE. Affirmed.

Facts: On 15 April, 1925, P. L. Threlkeld and wife Bell M. Threlkeld and J. B. Cory and wife Addie M. Cory, sold and conveyed to the defendant Malcragson Land Co., a corporation, a piece of land in Buncombe County, containing approximately 5 acres. The deed to this land was duly recorded in the office of the register of deeds of Buncombe County on 31 July, 1925.

(2) On the same date, 15 April, 1925, the Malcragson Land Co., Inc., conveyed the same land to Robert S. Brown, trustee, to secure certain purchase-money notes, one of which for $2,600 was due 15 October, 1928, and payable to the plaintiffs P. L. Threlkeld and J. B. Cory. Brown is not made a party to this action. The deed of trust gives the usual power of sale in default in the payment of the note. This deed of trust was duly recorded 27 April, 1929.

(3) On 2 February, 1926, the Malcragson Land Co., Inc., conveyed the said 5 acres of land (approximately) and other land and Governor Heights, Inc., certain land, to Beverly Hills, Inc. The total acreage was approximately 194 acres. This deed was duly recorded on 6 March, 1926.

(4) On 1 March, 1926, Beverly Hills, Inc., executed a deed of trust to Central Bank & Trust Co., trustee, for the 194 acres to secure an indebtedness of $325,000 to various bondholders. This deed of trust was immediately recorded.

The prayer of the complaint is "that the note and deed of trust owned by the plaintiffs and described herein be declared a first lien against all of the properties of the Malcragson Land Company, and Beverly Hills, Inc.," etc.

The prayer of the amended complaint is as follows:

"1. That on account of the matters and things alleged in the complaint and in this amended complaint, that the note of twenty-six hundred ($2,600) dollars and interest, and the deed of trust owned by the plaintiffs and fully set forth in the complaint, be declared a lien not only against the property in said deed of trust set forth in paragraph two of the complaint, but also against all properties of Beverly Hills, Inc., as is fully described in paragraph four of the complaint.

"2. That a commissioner be appointed to sell all the right, title and interest in and to all the lands described in said complaint, or so much thereof as may be necessary, to pay off said notes and interest due said plaintiffs, and execute sufficient deed in fee to the purchaser therefor, and pay the plaintiffs the sum of twenty-six hundred ($2,600) dollars, and interest at 6 per cent per annum from 15 April, 1925, and pay over the balance, if any, to the clerk of Superior Court, to be paid to the defendants herein.

"3. That said plaintiffs recover of said defendants the sum of twenty-six hundred ($2,600) dollars, and interest from 15 April, 1925."

The plaintiff filed a notice of *lis pendens* on the 194 acres of land and thereafter filed notice of amended *lis pendens* on only the 5 acres of land in the deed of trust to Robert S. Brown, trustee, for plaintiffs to secure the $2,600 balance purchase money on the land.

The other material facts will be treated in the opinion.

The court below rendered the following judgment: "This cause coming on to be heard, and being heard, upon the motion made by the defendants in the above entitled case, before his Honor, N. A. Sinclair, judge presiding over the Superior Court of Buncombe County, State of North Carolina, at the special term, August, A.D. 1929, of the Superior Court of Buncombe County, for an order canceling and removing from the records the alleged *lis pendens* which the plaintiffs have filed in

the office of the clerk of the Superior Court of Buncombe County, State of North Carolina, against the lands of the defendants in this action, and it appearing to the court from an examination of the entire record, including the complaint and amended complaint of the plaintiffs herein, that this is not an action affecting the title to real property and that the plaintiffs are not entitled to any *lis pendens* against the lands of the defendants, or any part thereof. It is, therefore, ordered and adjudged: (1) That the plaintiffs are not entitled to any *lis pendens* or notice of *lis pendens* against any part of the lands of the defendants in the above entitled action. (2) That the *lis pendens* filed by the plaintiffs in the above entitled action, which said *lis pendens* is recorded in the office of the clerk of the Superior Court of Buncombe County, State of North Carolina, in *lis pendens* Book 2, at page 182, and also the notice of an amended *lis pendens* filed in the office of the clerk of the Superior Court of Buncombe County, State of North Carolina, on 12 August, 1929, be, and they hereby are, canceled and removed from the records, and adjudged and declared to be void and of no effect. The clerk will make an entry upon the *lis pendens* Book and indexes where said notices of *lis pendens* appear that the same have been canceled in accordance with this order."

The plaintiffs excepted, assigned error and appealed to the Supreme Court.

Roberts, Young & Glenn for plaintiffs.
Bernard, Williams & Wright for defendants.

CLARKSON, J. It goes without saying that there could be no *lis pendens* on the entire 194 acres. The record discloses that the land that the controversy is about is approximately 5 acres and was first conveyed by plaintiffs to Malcragson Land Co., Inc., and by it with other land and Governor Heights, Inc., certain land, to Beverly Hills, Inc., totaling some 194 acres. The Beverly Hills, Inc., conveyed the 194 acres to the Central Bank & Trust Co., trustee, to secure an indebtedness of $325,000, due various bondholders. The deed of trust from the Malcragson Land Co., Inc., to Robert S. Brown, trustee for plaintiffs to secure $2,600 balance purchase money on the 5 acres, dated 15 April, 1925, was not recorded until 27 April, 1929, years after the land was deeded to others, and the deed of trust made to Central Bank & Trust Co., trustee.

"If a deed is registered, a subsequent purchaser has notice; but if a deed is not registered, and a subsequent conveyance is taken with actual knowledge of the former deed, and is registered first, it will have priority over the former deed, since it is held that no notice, however direct, will take the place of registration." North Carolina Practice and Procedure

(McIntosh), part sec. 344. C. S., 3309, 3311. *Roberts v. Massey,* 185 N. C., 164; *Bank v. Smith,* 186 N. C., at p. 641; *Ellington v. Supply Co.,* 196 N. C., at p. 789.

It appears of record that the 194 acres, in which the 5 acres in controversy is included, was conveyed to the Central Bank & Trust Co., trustee, to secure an indebtedness of $325,000. Plaintiff's deed of trust is subject to this lien. Upon the foreclosure of plaintiff's deed of trust they would have certain rights not necessary to discuss, if plaintiffs could set aside the deed from Malcragson Land Co., Inc., to Beverly Hills, Inc. The Central Bank & Trust Co., trustee, is not made a party to the action, but if it was and it took in good faith for value and without notice, its lien would still be prior to plaintiffs' deed of trust as it was registered before.

"Under C. S., 1009, a purchaser for value and without notice of any fraud gets good title by conveyance or transfer from fraudulent vendor. See *Cox v. Wall,* 132 N. C., 730." *Bank v. Mackorell,* 195 N. C., at p. 745. See *Arrington v. Arrington,* 114 N. C., at p. 166; *Brown v. Sheets,* 197 N. C., 268; 63 A. L. R., 1357.

There is no allegation in the complaint that the Central Bank & Trust Co., trustee, to secure the indebtedness of $325,000 is not a purchaser for value in good faith and that it had notice of the alleged fraud of Malcragson Land Co., Inc., and Beverly Hills, Inc., without such an allegation if the action was to foreclose the deed in trust of plaintiffs, plaintiffs' prayer could not be granted, that "the note and deed of trust owned by the plaintiffs and described herein be declared a *first lien,*" etc.

C. S., 500, is as follows: "In action affecting the title to real property, the plaintiff, at or any time after the time of filing the complaint or when or any time after a warrant of attachment is issued, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief at or any time after the time of filing his answer, if it is intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby."

C. S., 504, provides how the *lis pendens* notice can be canceled.

In *Arrington v. Arrington,* 114 N. C., at p. 159, it is said: "Without entering into a general discussion of the subject, it is sufficient to say that where the suit has been prosecuted with proper diligence the *lis pendens* continues until the final judgment (1 Beach Mod. Eq. Jur., 440, and Benn. Lis Pend., sec. 78), or until it has been canceled under the directions of the court. The Code, sec. 229 (C. S., 504, *supra*)."

In *Horney v. Price,* 189 N. C., at p. 824, it is said: "This *lis pendens* statute applies to 'an action affecting the title to real property.'" The subject is discussed in that case, citing authorities. It is not applicable to one seeking to recover a money judgment. *Pierce v. Mallard,* 197 N. C., 679; See *Brinson v. Lacy,* 195 N. C., 394.

In *Askew v. Hotel Co.,* 195 N. C., p. 456, we find the following principle: An existing corporation, when retaining its corporate identity and retaining assets sufficient to pay its creditors, does not effect a merger by exchanging its stock with another and similar corporation, so as to make the latter liable for its debts under the doctrine of implied assumpsit or substitution of debtors, in the absence of fraud. C. S., 1005. *Helsabeck v. Vass,* 196 N. C., 603.

The present action is not to foreclose the deed of trust made by Malcragson Land Co., Inc., to Brown, trustee, for plaintiffs, to secure the $2,600 note. On account of plaintiffs' neglect and misfortune to register their deed of trust before the $325,000 lien to the Central Bank & Trust Co., trustee, for various bondholders, plaintiffs' deed of trust became subject to the Central Bank & Trust Co., trustee, deed of trust. The action is to recover on the $2,600 note from the maker Malcragson Land Co., and certain officers of the corporations and to set aside the deed made by Malcragson Land Co., Inc., to Beverly Hills, Inc. This action is not one "effecting the title to real property." The judgment below is

Affirmed.

T. J. JONES v. H. H. RHEA ET AL.

(Filed 22 January, 1930.)

Judgments P a—In this case held: judgment debtor was not entitled to assignment and acquired no rights as purchaser at execution sale.

Where a note has been reduced to judgment against its two co-makers, and one of them pays more than half thereof, and after execution is issued for the remainder the other pays the balance due and has the judgment assigned to a trustee for his benefit, and bids in the property at the execution sale on the lands of the first judgment debtor: *Held,* the judgment debtors were jointly and severally liable on the judgment, and the debtor paying less than half thereof may not maintain that he was liable as surety contrary to the record, and he was not entitled to the assignment, and his title as purchaser at the execution sale is not good as against a subsequent purchaser from the first judgment debtor, and, the amount of the purchase price at the sale being repaid to him as the assignee of the judgment creditor, he has suffered no loss, and an instruction directing a verdict in his favor in his action to be declared the owner of the lands is reversible error. C. S., 614, 618, 3309.

JONES *v.* RHEA.

APPEAL by defendants from *McElroy, J.*, at July Term, 1929, of ASHE. New trial.

C. W. Higgins, Ira T. Johnson and T. C. Bowie for plaintiff.
W. R. Bauguess for defendants.

ADAMS, J. The plaintiff brought suit to be declared the owner of a one-third undivided interest in the land described in the complaint. J. H. Gentry had formerly owned this interest in fee simple. On 1 August, 1917, Ethel Graybeal, then unmarried, and J. H. Gentry and his wife, Effie C. Gentry, executed a deed of trust to F. S. Kirkpatrick and D. H. Howard, trustees, to secure the payment of $6,000 evidenced by two notes, one in the sum of $5,000 payable to Mary D. Kirkpatrick, and the other in the sum of $1,000 payable to Sallie R. West. The property conveyed in the deed of trust consists of the land described in the complaint and another tract containing one hundred acres. The parties agreed that if default in payment were made and a sale of the property became necessary recourse should first be had to the second tract for the payment of $4,000, and that for payment of the remaining $2,000 J. H. Gentry's undivided interest in the tract described in the complaint should first be sold. On 2 August, 1920, the $4,000 was paid; the remainder of the debt was unliquidated.

On 17 April, 1922, Thomas J. Graybeal obtained and docketed a judgment for $2,371.47 with interest against J. H. Gentry and Thomas J. Jones as principals, and C. S. Goss as surety. The judgment is credited with $1,500 paid by Gentry. The clerk issued an execution on 2 August, 1926, and on 6 of September the sheriff exposed to sale Gentry's undivided interest in the land and executed and delivered to the plaintiff as purchaser a deed of conveyance which was duly registered on 25 March, 1927.

On 5 April, 1922, J. H. Gentry and his wife and Ethel Graybeal Haggaman and her husband, J. E. Haggaman, conveyed in fee the land described in the complaint to J. F. Rhea and S. L. Mock. This deed was registered on 12 May, 1922. It was admitted that the land described in the sheriff's deed is the land described in the complaint and in the deed of trust, and that the defendants were in possession of the land in controversy.

These are the material facts upon which his Honor submitted the issue, "Is the plaintiff the owner and entitled to the possession of one-third undivided interest in the land described in the complaint in this cause?" The jury returned an affirmative answer under a directed instruction to do so if they believed the evidence. Judgment was given for the plaintiff and the defendants excepted and appealed.

The lien of a judgment on real property is effective from the moment the judgment is properly docketed. C. S., 614; *Trust Co. v. Currie,* 190 N. C., 260. An unregistered deed, although valid between the parties, does not convey title as against creditors or purchasers for a valuable consideration. C. S., 3309; *Cowan v. Withrow,* 109 N. C., 636; *Hooker v. Nichols,* 116 N. C., 157. As the lien of the judgment antedates the registration of the deed executed by Gentry and his cotenants to Rhea and Mock, we should conclude, in the absence of other evidence, that the sheriff's deed conveyed the better title. But the defendants contend that the plaintiff is barred by reason of the following undisputed facts:

The Graybeal judgment was recovered on a note in which the plaintiff and J. H. Gentry were principals. The judgment creditor received from Gentry $1,500, credited the judgment with this sum, and afterwards caused an execution to be issued against all the judgment debtors. More than three weeks after the execution had been issued the judgment creditor received from the plaintiff $1,153.32 and sold and transferred the judgment to a trustee, who was to hold it for the benefit of the plaintiff.

The defendants contend that the plaintiff and Gentry were jointly and severally liable on the note and judgment (C. S., 459), and that the plaintiff after paying the remainder due on the judgment acquired no rights against them by having the judgment assigned to a trustee for his benefit. They tendered an instruction to this effect which the judge declined to give the jury.

This Court has held in a number of cases that a surety who pays a judgment may preserve the lien thereof against the principal debtor by taking an assignment of the judgment to a trustee for his benefit. *Davie v. Sprinkle,* 180 N. C., 580; *Fowle v. McLean,* 168 N. C., 537; *Bank v. Hotel Co.,* 147 N. C., 594; *Peebles v. Gay,* 115 N. C., 38; *Hodges v. Armstrong,* 14 N. C., 253. In his reply the plaintiff alleged that he had signed the note as surety for Gentry, but the record evidence he introduced shows that he and Gentry were principals in the note and in the judgment. If they were principals they were liable jointly and severally to the judgment creditor, and their liability *inter se* was determinable by section 618 of the Consolidated Statutes. The relevant provisions are as follows: "In all cases in the courts of this State wherein judgment has been, or hereafter may be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint *tort-feasors,* and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof, if one of the judgment debtors shall pay the judgment creditor, either before or after the execution has been issued, the amount due on said

judgment, and shall, at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same."

In its application to the question under discussion the statute contemplates the payment by one of two or more joint obligors who are primarily and equally liable either of the entire debt or of more than his proportionate part of it as precedent to his right to demand of the judgment creditor a transfer of the judgment to a trustee. The evidence fails to disclose the plaintiff's payment of any sum in excess of his proportionate part of the debt; in fact it shows that he paid less than his part. When the plaintiff made his payment Gentry had already paid more than one-half the amount to which the judgment creditor was entitled.

To meet this situation the plaintiff contends that the cost of the suit and the sheriff's commissions were sufficient to sustain the sale even if the judgment creditor's title was not transferred to the trustee and that the costs were paid by the purchaser after the sale. The record, we think, indicates otherwise. The plaintiff, having previously paid the remainder actually due on the judgment, bid $500 at the sale and the sheriff, according to his return, paid this entire sum "to the assignee of the judgment creditor." The payment was made, if at all, for the benefit of the plaintiff because it was for his benefit that the trustee accepted the assignment. It is apparent from the officer's return that the plaintiff suffered no loss. Whether Gentry objected to the sale does not appear; he is not a party to the suit.

His Honor inadvertently failed to submit the defendants' contention in reference to the assignment of the judgment, and for this reason there must be a new trial. There are other exceptions which may not again be presented.

New trial.

J. H. WILLIAMS v. FREDERICKSON MOTOR EXPRESS LINES, INC.

(Filed 22 January, 1930.)

1. Highways B e—Evidence of defendant's negligence in parking without lights held sufficient.

Evidence tending to show that the plaintiff's automobile collided with defendant's truck parked partly across the highway on a dark night without a tail light in violation of statute, causing personal injury to the plaintiff and damage to his car, is sufficient to sustain an affirmative answer upon the issue of defendant's actionable negligence. C. S., 2621 (77), 2621(94).

2. Negligence D c: Highways B g—Where two inferences are permissible from evidence as to plaintiff's negligence the question is for jury.

Contributory negligence of the plaintiff will not be held to bar recovery as a matter of law when an inference in his favor is permissible from the evidence, and in this case where the defendant had parked its car on a dark night upon the side of the highway without a tail light, and there is a reasonable inference that under the existing conditions the plaintiff could not have seen the truck in time to have avoided the injury, in the exercise of ordinary care, the question of contributory negligence upon the issue is for the determination of the jury.

CIVIL ACTION, before *Sink, Special Judge,* at March Term, 1929, of MECKLENBURG.

The evidence tended to show that on the early morning of 26 November, 1927, at about 4 o'clock in the morning, the plaintiff was driving his automobile between Charlotte and Gastonia on Highway No. 20, which is an improved highway. About ten miles from Charlotte the plaintiff, while driving on the proper side of the highway, at a speed of about twenty-five miles an hour, collided with a truck owned by the defendant, which was parked on the highway without a tail light. The body of the truck stood about fifty inches from the ground. The tail gate of the truck was projecting at an angle of about 45 degrees, and there was no light on the tail gate.

Plaintiff testified that prior to the collision he was keeping a "lookout up to the time the collision occurred." Plaintiff further testified that the lights on his car were adjusted in accordance with the requirements of the law of North Carolina.

There was further evidence that the plaintiff was going up grade when the collision occurred; that the pavement was dry, and that it was very dark. "The road was straight all the way up the hill" for at least 200 yards. The hard surface was about 22 feet wide at the point of the collision. Plaintiff testified: "I guess I was within five or ten feet of the truck before I saw it. If the truck was moving I could not tell you. When I hit it, it did not drag me one inch. I came to a dead stop as soon as I hit it. I ran my car up underneath the bottom of the truck." The truck was loaded with automobile tires and stood about twelve feet high, and was five or six feet wide.

The testimony further tended to show that plaintiff sustained property damage and serious personal injury.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff.

The verdict awarded damages in the sum of $3,757.00.

The defendant offered no evidence.

From judgment upon the verdict the defendant appealed.

D. B. Smith and Stewart, McRae & Bobbitt for plaintiff.
Thaddeus A. Adams and John M. Robinson for defendant.

BROGDEN, J. The plaintiff was driving an automobile in the night time, up grade on a dry hard-surfaced road, with the lights on his car properly adjusted, and ran into an unlighted truck apparently parked on the hard surface on the right-hand side of the road as plaintiff was approaching. The bottom of the truck stood fifty inches from the ground, and the lights on plaintiff's car upon a level surface would have thrown a beam something like two hundred yards. There is no evidence as to how far the beam would have been thrown while traveling up grade.

The defendant was plainly guilty of negligence by reason of express violation of C. S., 2621 (77) and 2621 (94), and hence the determinative question at issue is whether the plaintiff was guilty of contributory negligence, barring recovery, as a matter of law.

The defendant relies upon *Hughes v. Luther,* 189 N. C., 841, 128 S. E., 145, and *Weston v. R. R.,* 194 N. C., 210, 139 S. E., 237. Neither of these cases is applicable to the facts disclosed in the present record. In the *Hughes case* the plaintiff saw the unlighted truck parked on the highway 75 yards away, and was therefore fully apprised of the danger, and yet, took no precaution for his own safety. In the *Weston case* there was no evidence that the defendant was guilty of any negligence at all. Furthermore, the plaintiff in that case was fully apprised of the danger because he discovered in the rain and mist an object in front of him. Notwithstanding, "he made no effort to reduce his speed until it was too late."

In the present case, the evidence tended to show that the plaintiff did not see the unlighted truck and had no notice of impending danger until he was within five or ten feet thereof. The question is: Ought he to have seen, in the exercise of ordinary care for his own safety; or to state it differently, was his failure to see, under the circumstances, contributory negligence as a matter of law?

In the case of *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598, *Stacy, C. J.,* wrote: "In its present state, the law is not able to protect one who has eyes and will not see—ears and will not hear." Furthermore, the law imposes upon the driver of a motor vehicle the duty of keeping a reasonably careful lookout, not only for other travelers, who are using the highway, but for dangers incurred along the journey. Huddy on Automobiles, 7th ed., 950. As to whether a motorist, at a given time, was keeping a reasonably careful lookout to avoid danger is ordinarily an issue of fact, and hence the determination of such fact is for a jury. Moreover, the question as to whether it is contributory neg-

ligence as a matter of law to run into an unlighted truck in the night time, upon a straight road, and where there is nothing to obscure the vision of the driver, has been debated by many courts of this country. An examination of the cases dealing with the subject discloses that there is a wide difference in the judicial thinking upon the subject. For instance, the Kansas Court in *Haines v. Carroll,* 267 Pac., 986, has held that under such conditions it is contributory negligence as a matter of law and no recovery can be had. The Washington Court, in a decision rendered in September, 1927, in the case of *Millspaugh v. Alert Transfer Co.,* 259 Pac., 22, held that the driver of a motorcycle, running into an unlighted truck was guilty of negligence as a matter of law. It appeared, however, that the lights of the motorcycle were weak. Upon the other hand, the Oregon Court in *Murphy v. Hawthorne,* 244 Pac., 79, 44 A. L. R., 1397, holds that colliding with an unlighted truck in the night time raises an issue of fact for the jury. To the same effect is the holding of the Connecticut Court in *Rozycki v. Grain and Products Co.,* 122 Atlantic, 717, 37 A. L. R., 582. It is to be noted, however, that there was evidence of circumstances obscuring the vision of the driver. The Arkansas Court, in the case of *Coca-Cola Bottling Co. v. Shipp,* decided in 1927, 297 S. W., 856, held that it was contributory negligence as a matter of law to run into a truck parked on the highway at night. Upon rehearing this ruling was reversed upon the ground that such facts raised an issue for the jury. The final ruling of the court upon rehearing was by a four to three vote.

These cases from other jurisdictions are referred to, in order to show the existing difference in judicial opinion upon the subject.

However, in this State, the law with respect to nonsuit upon the ground of contributory negligence is well settled. The main difficulty consists in applying the settled rules of law to the facts of a given case. In *Battle v. Cleave,* 179 N. C., 112, 101 S. E., 555, *Hoke, J.,* expressed the principle tersely and succinctly in these words: "The burden of showing contributory negligence, however, is on the defendant, and the motion for nonsuit may never be allowed on such an issue where the controlling and pertinent facts are in dispute, nor where opposing inferences are permissible from plaintiff's proof, nor where it is necessary in support of the motion to rely, in whole or in part, on evidence offered for the defense."

Applying this declaration of law to the facts disclosed in the present record, are there "opposing inferences permissible from plaintiff's proof"? The evidence for plaintiff tended to show that he was keeping a proper lookout but that he was traveling up grade at the time of the collision, and the lights of his automobile having been adjusted accord-

ing to law, threw the rays "down on the surface of the road." Hence the lights would not "pick up" the truck, the bottom of which was standing fifty inches from the ground.

We are of the opinion that "opposing inferences" are permissible from plaintiff's proof, and therefore the case was properly submitted to the jury.

No error.

EDWIN ANDERSON METTS v. PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA.

(Filed 22 January, 1930.)

1. **Insurance R c—In this case held: policy was not income insurance and did not cover inability to obtain work after end of disability.**

   Under the provisions of the policy of health insurance indemnifying the insured from loss resulting from such disability as would result in continuous and total loss of business time during "the continuance of disability as defined above until such time as the insured engages in a gainful occupation": *Held*, the policy is not income insurance, and the loss insured against is that which the insured should sustain from the continuous loss of business time based upon the conditions thus expressed, and does not entitle the insured to recover thereon for his inability to obtain an employment such as he may desire after the termination of disability covered by the policy.

2. **Trial D c—Where plaintiff's testimony discloses facts entitling him to recovery and facts precluding recovery question is for jury.**

   Where the insured has testified as to the facts that would, if found in his favor by the jury, entitle him to recover certain damages as indemnity against loss from sickness under the terms of the policy, and also as to a basis of fact for damages excluded by the terms of the policy, it is for the jury to determine under proper instructions upon the weight of the evidence the essential facts at issue.

3. **Trial E e—Refusal of court to give instructions requested correctly stating the law is reversible error.**

   The refusal of the trial judge to fully give instructions requested that contain the law arising from the evidence is reversible error, and the requirement is not met by his partially giving them when his omissions are of material matters.

CIVIL ACTION, before *Harwood, Special Judge,* at March Special Term, 1929, of BUNCOMBE.

The plaintiff alleged that on or about 2 May, 1921, the defendant issued to him its policy No. 4610130, and that thereafter on or about 14 January, 1924, while the policy was in force, the "plaintiff was taken

sick and became ill with a bodily disease by reason of which he was totally disabled and incapacitated to do or carry on any work or occupation."

It was further alleged "that as soon as plaintiff, acting upon the advice of his said physician, was able to engage in a gainful occupation, to wit, on or about 1 January, 1925, the plaintiff began and continued diligently to seek a gainful occupation until 15 June, 1925, when he secured employment and began to engage in what he believed to be a gainful occupation."

The evidence discloses that the plaintiff was paid a benefit of $500 a month, as provided in the policy, up to 14 December, 1924, and he brings suit to recover $3,000 benefit in accordance with the terms of said policy, covering the period from 14 January, 1925, to 14 June, 1925, aggregating $3,000. Subsequently the plaintiff filed an amended complaint alleging that the policy was an income policy and not a disability policy, and that therefore he was entitled to receive $500 per month "until such time as the plaintiff engages in a gainful occupation."

The policy was offered in evidence and is denominated upon the face thereof "Non-Cancellable Income Policy." The language of the policy out of which the controversy grows is substantially as follows: "This policy provides indemnity . . . for loss of time by sickness. . . . The Pacific Mutual Life Insurance Company of California hereby insures Edwin Anderson Metts . . . against disability commencing while this policy is in force and resulting from sickness; such disability . . . to be such as will result in continuous total loss of business time. . . . The company will pay indemnity at the rate of $500 per month during the continuance of disability as defined above until such time as the insured engages in a gainful occupation."

The plaintiff testified that he suffered a total loss of business time on account of sickness "from the first part of January, 1924, until June, 1925—about the middle of June, 1925." On cross-examination he testified that he had alleged in his original complaint that he was able to engage in a gainful occupation on 1 January, 1925, and that his physician told him he was able to resume work after 1 January, 1925, but with certain restrictions to the effect that he could not engage in any work, "where it was confining, and I could not take a position out of doors." Plaintiff further testified: "After the first of January I began a search for a job, and if I had found a job that suited me on the first of January I would have taken it. If I had found a job that paid me what the company had me insured for, I would have taken it if it complied with the doctor's instructions. I was acting under his instructions and restrictions, and if I had found a job that suited me on the first of January, of course I would have taken it, and that would have ended the

matter. That is the way I understood the contract. I found a job in March, and the doctor turned it down. If the doctor would have approved it, I would have taken it in March if it suited me and suited the doctor. I was honestly looking for a job."

The issue submitted to the jury was: In what amounts, if any, is the defendant indebted to the plaintiff? The jury answered the issue awarding $3,000 with interest at six per cent per annum.

From judgment upon the verdict the defendant appealed.

Rollins & Smathers for plaintiff.
J. E. Swain for defendant.

BROGDEN, J. From the language employed in the policy it seems apparent that disability from sickness resulting "in continuous total loss of business time" is the basis of awarding indemnity, such indemnity being payable during the "continuance of disability . . . until such time as the insured engages in a gainful occupation."

It is admitted that the defendant owes the plaintiff the sum of $266.65 for indemnity accruing prior to 1 January, 1925. The question, then, is: Did the disability from sickness cause the plaintiff to suffer a "total loss of business time" from January, 1925, until June, 1925? Thus a clear cut issue of fact was presented. The plaintiff testified that he suffered a total loss of business time, due to sickness, from January, 1924, until June, 1925. This unequivocal testimony was qualified on cross-examination, but it was the function of the jury to determine the weight of the evidence and to find the essential facts. The case was tried upon the theory that the policy was a disability policy rather than an income policy.

The defendant in apt time requested the court to give the following instructions to the jury:

1. "If the jury should find from the evidence that the defendant issued to the plaintiff the policy and contract of insurance which has been introduced in evidence, and should further find that plaintiff filed his claim for benefits thereunder, and that the same were paid by the defendant at the rate of $500 a month from the time they became due until 14 December, 1924, and if the jury should further find that on 1 January, 1925, the plaintiff had sufficiently recovered from his illness so that he was able to engage in a gainful occupation as contemplated by the contract of insurance, then the plaintiff would be entitled to recover of the defendant benefits from 14 December, 1924, to 1 January, 1925, which amount may be calculated by you, the defendant claiming that it is the sum of $266.65, but would not be entitled to recover of the defendant anything after the said 1 January, 1925."

2. "If you should find from the evidence that the plaintiff was able on and after 1 January, 1925, to engage in a gainful occupation from and after that time, but was unable to find suitable employment until 14 June, 1925, he would not be entitled to recover benefits for that period under the terms of this contract of insurance, and it will be your duty to so answer the issue."

3. "Under this contract of insurance the defendant would not be due the plaintiff anything by reason of plaintiff's inability to find a job or secure employment. This contract of insurance does not insure to the plaintiff a job, or a gainful occupation, but guarantees to him an income in the sum of $500 per month during the period which he is prevented from engaging in a gainful occupation solely on account of bodily injury received while the policy was in force, or disease contracted while the said policy was in force, which resulted in his continuous total loss of business time."

The evidence introduced warranted the special instructions requested, and the omission of the trial judge to give them, as requested, constituted error. The trial judge gave a portion of instruction number 3, but it would seem that the defendant was entitled to the instruction in its entirety. *Horne v. Power Co.,* 141 N. C., 50, 53 S. E., 658; *Marcom v. R. R.,* 165 N. C., 259, 81 S. E., 290; *Parks v. Trust Co.,* 195 N. C., 453, 142 S. E., 473; *S. v. Lee,* 196 N. C., 714, 146 S. E., 858.

New trial.

BRYAN CLAY v. E. E. CONNOR AND ELVA CONNOR.

(Filed 22 January, 1930.)

Evidence D f—Testimony as to statement made by witness inconsistent with his testimony is competent for purpose of impeachment.

In impeaching a witness, testimony as to previous statements he had made material and relevant to his cause of action which were inconsistent with his testimony on the stand, is competent as tending to weaken his credibility, and the exclusion of such testimony by the trial court entitles the defendant to a new trial.

APPEAL by defendants from *Sinclair, J.,* and a jury, at August Special Term, 1929, of BUNCOMBE. New trial.

Plaintiff contends that the defendants agreed to sell him a house and lot and fourteen shares of stock in the Fairview Gravity Water Company for the sum of $1,800. They made him a deed for the house and lot and delivered possession to him and he thereafter enjoyed the privileges which accrued to him as the purchaser of the water stock for a

period of five years, and was never called upon by the Fairview Gravity Water Company for any water rents, it being in evidence that the owner of as many as fourteen shares in the Fairview Gravity Water Company had the privilege of using water from said company without paying any water rents, and only those who did own so much stock thereof were so privileged or allowed to connect to said Fairview Gravity Water Company. The defendants did not deliver the shares of stock in the Water Company to plaintiff, although he enjoyed the full use of the water rights, and this suit was for the recovery of the shares of stock, or their value, it being in evidence that the shares have in the meantime been sold to somebody else.

Plaintiff's prayer for judgment was as follows:

"1. That he have and recover a decree of this court ordering and directing the said defendants to endorse and deliver to the plaintiff the said stock in the Fairview Gravity Water Company.

2. That the plaintiff have and recover of the defendants, and each of them, judgment in the sum of $350, for the breach of said contract, and interest thereon from 20 July, 1921.

3. That the deed conveying said premises to the plaintiff be reformed and made to show the total consideration therefor, as hereinbefore alleged.

4. For the costs of this action to be taxed by the clerk.

5. For all other and further relief to which the plaintiff may be entitled in law and equity."

Defendants denied that they agreed to sell the fourteen shares of stock in the Fairview Gravity Water Company, but sold only the house and lot.

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Was the free use of the water rights by the plaintiff as a stockholder in the Fairview Gravity Water Company an appurtenance belonging to the land described in the complaint? Answer: Yes.

2. In what amount, if any, has the plaintiff been damaged by the refusal of the defendant to transfer and deliver to the plaintiff their fourteen shares of stock in said water company? Answer: $350 without interest."

Judgment was rendered by the court below on the verdict. Defendants made numerous exceptions and assignments of error and appealed to the Supreme Court.

The material facts will be set forth in the opinion.

Ellis C. Jones for plaintiff.

Wells, Blackstock & Taylor for defendants.

CLARKSON, J. The plaintiff introduced evidence to the effect that he purchased the house and lot for $1,800, "with all the appurtenances thereunto belonging or in anywise appertaining." That he purchased with the house and lot the fourteen shares of stock valued at $350, in the water company, and defendants failed and refused to deliver same. The defendants denied that they sold the stock.

The defendant, E. E. Connor, testified as follows: "In June, 1922, I went out to Fairview and had a conversation with Mr. Clay, and offered to sell him my stock for one-half of what I originally offered. I had originally offered it for $350. He asked me to give him ten days to consider. I told him I had not come out with such a proposition, but if he wanted ten days I would give it to him." This evidence was objected to by plaintiff, and the court below sustained the objection, and defendants excepted and assigned error. The court below should have admitted the testimony.

J. E. Shuford, a witness for defendants, testified: "I was present with Mr. Connor some time in 1922, when he had a conversation with Mr. Clay at Fairview concerning the stock. Q. After that, after the conversation with Mr. Connor and Mr. Clay, when you were present, did you have another conversation with Mr. Clay in regard to this stock of the Fairview Gravity Company? A. I asked Mr. Clay after this conversation between him and Mr. Connor that I was witness to, I said 'Why don't you buy that stock?' He said he didn't buy the stock; that his deed for the house and lot included all appurtenances thereto and that gave him the right to the water stock; that was all the statement I heard Mr. Clay make." This evidence was objected to by plaintiff, and the court below sustained the objection and defendants excepted and assigned error. The court below should have admitted the testimony. The evidence was material as bearing on the contract alleged on one side and denied on the other: Was the stock sold with the house and lot? A deed carrying an easement as to water rights, see *Blankenship v. Dowtin,* 191 N. C., 790.

The court below, recognizing the controversy waged over a contract, charged the jury correctly as to what was a contract: "A contract, gentlemen of the jury, is said to be the meeting of two minds. The minds must come together and understand and agree upon each and every detail of the contract before it is considered a contract. If there is some detail or condition which one party understands and the other does not, that is not a contract; both minds must meet and understand and agree upon each and every detail." This definition does not mean immaterial details. This evidence was introduced by defendants for the purpose of impeaching plaintiff's testimony, and we think the exclusion prejudicial to the defendants.

Speaking to the subject, we find in Wigmore on Evidence, Vol. 2, 2d ed., part sec. 1040, p. 491-2, the following: "In the present mode of impeachment, there must be of course a *real inconsistency* between the two assertions of the witness. The purpose is to induce the tribunal to discard the one statement because the witness has also made another statement which cannot at the same time be true. . . . Thus, it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required. Such is the possible variety of statement that it is often difficult to determine whether this inconsistency exists. But it must appear 'prima facie' before the impeaching declaration can be introduced. As a general principle, it is to be understood that this inconsistency is to be determined, not by individual words or phrases alone, but by the *whole impression or effect* of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs? *Clifford, J.*, in *U. S. v. Holmes*, 1 Cliff., 116: 'Directness, in the technical sense, is not necessary to give the evidence that character, nor is it necessary that the contradiction should be complete and entire, in order to admit the opposing testimony. Circumstances may be offered to rebut the most positive statement, and it is only necessary that the testimony offered should have a tendency to explain, repel, counteract, or disprove the opposite statement in order to render it admissible.' "

"There are also three other modes of impeaching the credit of a witness: (1) By disproving his statements, made in court, by the testimony of other witnesses; (2) By proving statements of the witness made out of court, inconsistent with or contradicting those made by him on the witness-stand," etc. Jones on Evidence, 2d ed., sec. 844, p. 1074.

It is well settled that it is competent to show previous inconsistent statements made by witnesses to weaken their credibility and consistent statements to strengthen their credibility. Ordinarily a party may not impeach his own witness, but may show a different state of facts by another witness.

The issues upon another trial should be reformed. For the reasons given, there must be a

New trial.

DAN WRIGHT v. PHŒNIX UTILITY COMPANY, CAROLINA POWER AND LIGHT COMPANY AND JACK FERGUSON.

(Filed 22 January, 1930.)

1. **Removal of Causes C b—Where one resident defendant is a fellow-servant and the other the letter of an independent contract removal upon petition of nonresident contractor is proper.**

   Where it appears in a petition for the removal of a cause from the State to the Federal Court that one of the resident defendants was a mere fellow-servant and that the nonresident defendant was an independent contractor doing work thereunder for the other resident defendant, and that the work under the contract was not inherently dangerous: *Held*, where the amount involved was sufficient and the proper procedure followed the petition of the nonresident defendant for the removal of the cause from the State to the Federal Court for diversity of citizenship was properly allowed.

2. **Master and Servant D a—In order to liability of letter of independent contract the work to be done must be inherently dangerous.**

   The delegation of a duty under contract must be inherently dangerous in order for the letter of the contract to be liable for an injury inflicted upon an employee of the independent contractor in the performance of the work thereunder, and an inherent danger is one that is inherent to the performance of the contract itself and not a danger that might result from carelessness in the performance.

CIVIL ACTION, before *Grady, J.*, at Special August Term, 1929, of HAYWOOD.

The plaintiff alleged that he was employed by the Phœnix Utility Company, a foreign corporation, and that said corporation had a contract with its codefendant, Carolina Power and Light Company, by the terms of which the said Phœnix Utility Company "was to construct certain tunnels under Cataloochee Mountain and other mountains in Haywood County."

Plaintiff further alleged that he was required "to stand immediately over and adjacent to a silo, and there to cut cement sacks and to open the same, and to cause said cement to be poured into the mouth of the silo, and thereafter to be permitted to fall through said silo down to a floor below where the same was to be used in making concrete; and that in cutting the wires from said sacks, and in opening said sacks, and thereafter permitting the same to spill and fall through said silo, large quantities of cement and dust would fly through the air so thick that the plaintiff and other employees could not see any distance; and that the plaintiff was constantly required to breathe said cement and dust into his lungs, which caused plaintiff to be injured, damaged and ruined for life as hereinafter alleged." That Jack Ferguson "was placed in charge of a

dinkey engine and cars used by the defendants for conveying cement to the plant of the defendant companies near the mouth of one of the tunnels, . . . and it was the duty of said Jack Ferguson, foreman for the defendant companies, not to cause said dinkey engine and cars to be wrecked and the sacks of cement to be thrown on and around the plaintiff, and permitted to burst, so much so that the contents of said sacks spread over the plaintiff and caused him to inhale the same, and to be overcome as a result thereof."

Plaintiff further alleged that he began work on 10 August, 1928, and continued until 23 December, 1928, when he discovered "that he was inhaling large quantities of dust and particles of cement, and that it was causing him to cough, and otherwise injuring his chest, throat, larynx, and other parts of his body."

Plaintiff further alleged that he was furnished with a mask to prevent the inhalation of dust, and that after the masks were worn out the defendants failed to furnish other suitable masks.

The defendant, Phœnix Utility Company, in apt time, filed a petition for removal, alleging that the plaintiff was an employee of said corporation, and that the Carolina Power and Light Company had made a contract with the Phœnix Utility Company, whereby the Utility Company was to construct certain tunnels as an independent contractor.

The petitioner further alleged that Jack Ferguson was only a laborer and operator of a dinkey engine, and that said Ferguson was not a foreman, vice-principal, or agent in any respect whatsoever, "but was simply an employee engaged to perform certain services for the stipulated wages agreed upon; that the said Jack Ferguson had absolutely no authority over, or control, or direction of the plaintiff in this action, or any other employee upon said works, but was himself under the orders and directions of Harvey Allen, another employee of the petitioner, Phœnix Utility Company.

Both the Carolina Power and Light Company and Jack Ferguson are residents of North Carolina, and the petitioner alleged that the joinder of Jack Ferguson and the Carolina Power and Light Company, as defendants in this action was a fraudulent joinder as contemplated by law.

The motion for removal was granted by the clerk of the Superior Court of Haywood County, and the plaintiff appealed to the trial judge, who affirmed the judgment of the clerk and decreed that the cause should be removed to the Federal court, from which judgment the plaintiff appealed.

Morgan, Ward & Stamey for plaintiff.
Rollins & Smathers and Harkins & Van Winkle for defendant.

BROGDEN, J. It is to be observed that the plaintiff was not engaged in constructing tunnels, but that his sole duty was to open sacks of cement. Necessarily cement dust would arise from such an operation.

Practically every phase of the law of removal has been discussed by this Court in a long line of opinions, and it is, therefore, unnecessary to "thresh over old straw."

The simple question is whether the record, in the case at bar, falls within the principles of law announced in *Crisp v. Fibre Co.,* 193 N. C., 77, 136 S. E., 238, and *Givens v. Mfg. Co.,* 196 N. C., 377, 145 S. E., 681, or within the principles announced in *Rea v. Mirror Co.,* 158 N. C., 24, 73 S. E., 116; *Johnson v. Lumber Co.,* 189 N. C., 81, 126 S. E., 165, and *Cox v. Lumber Co.,* 193 N. C., 28, 136 S. E., 254.

We are of the opinion that the case falls within the line represented by the *Rea, Johnson* and *Cox cases, supra.* The petition for removal clearly discloses and engenders the conclusion, by ample statement of fact, that the resident defendant, Jack Ferguson, was not a foreman, *alter ego,* or vice-principal. However, the Carolina Power and Light Company, a resident of North Carolina, was also joined, but it is clear that the real defendant, Phœnix Utility Company, was an independent contractor. The Carolina Power and Light Company would not be liable, therefore, unless the work was inherently or intrinsically dangerous. The term "intrinsically dangerous" has been defined by this Court in several decisions, notably *Scales v. Lewellyn,* 172 N. C., 494, 90 S. E., 521. "We have recently said that "The rule in regard to 'intrinsically dangerous' work is based upon the unusual danger which inheres in the performance of the contract, and not from the collateral negligence of the contractor. Mere liability to injury is not the test, as injuries may result in any kind of work where it is carelessly done, although with proper care it is not specially hazardous." *Vogh v. Geer,* 171 N. C., 672, 23 A. L. R., 1016.

Applying the principles of law to the particular facts in the case at bar, we are of opinion that the work required of plaintiff does not fall within the legal classification of "inherently dangerous." Hence it necessarily follows that the real defendant is the Phœnix Utility Company, a nonresident corporation, and the order of removal was properly made.

Affirmed.

MRS. ROSA FRADY, ADMINISTRATRIX OF A. L. FRADY, DECEASED, v. THE HARRIS GRANITE QUARRIES COMPANY.

(Filed 22 January, 1930.)

1. Master and Servant C b—Evidence of master's negligent failure to provide reasonably safe place to work held sufficient.

Evidence tending to show that the plaintiff's intestate was required to oil certain machinery while in motion on an uncovered platform seven by ten feet, elevated one hundred feet from the ground, and that the leg of the plaintiff's intestate was caught between the unguarded running gear and a timber of the platform, resulting in his fatal injury: *Held*, the evidence was sufficient to take the case to the jury upon the question as to whether the master had exercised due care under the circumstances to furnish his servant a reasonably safe place to work. *Honeycutt v. Brick Co.*, 196 N. C., 556, cited and applied.

2. Trial E g—Error in instruction in this case held cured by rest of charge and was harmless.

A charge upon the measure of damages recoverable for a wrongful death will not be held for reversible error when correct except to the use of the words "present value and pecuniary net worth of the deceased" when it appears that he had correctly charged elsewhere that it was the present value "or" pecuniary worth, etc., and it appears from the verdict that the jury did not misunderstand the law thereon.

APPEAL by defendant from *Oglesby, J.*, and a jury, at April Term, 1929, of ROCKINGHAM. No error.

This is an action for actionable negligence brought by Mrs. Rosa Frady, administratrix of A. L. Frady, deceased, against the defendant for the death of her husband. The defendant denied any negligence and set up the defense of contributory negligence and assumption of risk.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff's intestate's death due to the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff's intestate, by his own negligence, contribute to his injury and death, as alleged in the answer? Answer: No.

3. Did the plaintiff's intestate assume the risk incident to his employment, as alleged in the answer? Answer: No.

4. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $8,528."

D. F. Mayberry for plaintiff.

Fred S. Hutchins and Hunter K. Penn for defendant.

CLARKSON, J. The defendant introduced no evidence, and at the conclusion of plaintiff's evidence made a motion for judgment as in case of nonsuit. C. S., 567. The court below overruled the motion, and in this we can see no error.

The contention of plaintiff is to the effect that defendant owed her intestate the duty, in the exercise of ordinary care, to furnish him a reasonably safe place to work, and that this failure was the proximate cause of the death of plaintiff's intestate. That he was employed as an oiler of certain machinery of defendant; that the machinery was on a platform 7 feet wide and 10 feet long, about 100 feet from the ground; that he went up to the platform on a ladder straight up and down. There was no roof over the machinery. It was open to the elements and no walls to the platform. When the machinery was in operation, it made a great noise and there was some vibration. "It is awfully dusty around there." The machinery was used to run defendant's quarry and rock crushing plant. On the platform was located the head-gear machinery and elevator buckets used in conveying stone from the crusher located below, and the elevator buckets were driven by a large cog wheel, which was about 44 inches in diameter as same ran in mesh with another small pinion wheel that was fastened on a shaft connected with the main drive. This large cog wheel was fastened on a shaft that connected with the elevator buckets. There was an oil cup or bearing located on the shaft on which this cog wheel was fastened, and was located about four inches from said wheel. And there was a similar oil cup or bearing located on the shafting which operated the small pinion gear wheel. The oil cup or bearing on the shaft supporting the large cog wheel was about forty inches from the nearest edge of the platform, and the oil cup on the shafting operated by the small pinion wheel was about one foot from the edge of said platform. These oil cups extended from 8 to 10 inches above the shafting or bearing and contained about two pounds of cup grease, and were filled when they got empty, but usually when the machinery was standing. There was no guard rail around any of the machinery except a little slant something like three-quarters of an inch by four or five inches which was located at a point almost shoulder high.

It was the duty of plaintiff's intestate to oil the machinery when in motion; to do this he had to come very close to the unguarded machinery. In order for the plaintiff's intestate to reach the oil cups, either to refill or inspect same, it was necessary for him to come within four inches of the large cog wheel as above set out, and to come within the same distance of the small pinion wheel which worked in mesh with the large cog wheel, and he had to come in close proximity to the ex-

posed and unguarded cogs. It can be inferred there was dust that naturally got on the platform. While on the platform to oil the machinery, on 30 March, 1927, plaintiff's intestate's right leg was caught between the gear and timber and he was fatally injured before the machine could be stopped.

Under the facts in this case, we think there is sufficient evidence to be submitted to the jury. We think the facts are somewhat similar to and as strong as those in *Honeycutt v. Brick Co.,* 196 N. C., 556.

In *Brooks v. DeSoto Oil Co.,* 100 Miss., p. 849, 31 Am. & Eng. Anno. Cases, note p. 658, it is said: "A number of recent cases support the doctrine that even in the absence of a statutory requirement it is the master's duty to guard shafting, set screws, etc., or at least that the question of the master's negligence in failing to guard such appliances is one for the determination of the jury," citing numerous authorities. *Boswell v. Hosiery Mills,* 191 N. C., at p. 556. See *Tisdale v. Tanning Co.,* 185 N. C., 497; *Maulden v. Chair Co.,* 196 N. C., 122; *Street v. Coal Co.,* 196 N. C., 178; *Mills v. Mfg. Co., ante,* 145; *West v. Mining Co., ante,* 150.

The defendant excepts to the following from the charge: "If you should find by the greater weight of the evidence she is entitled to recover, the court instructs you that the measure of damages is the present value and the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living expenses from his gross income, based upon his life expectancy." The charge is correct with the exception that the court should have charged "present value *of* (instead of *and)* the net pecuniary worth of the deceased." The court later charged fully and sufficiently the basis on which to enable the jury to make their estimate. The plaintiff's intestate was 47 years old, his expectancy was some 23 years. He was making $4.40 a day, and his living expenses were about $10 a week. From the amount of the verdict rendered we do not think the error was prejudicial. *Benton v. R. R.,* 122 N. C., 1007; *Purnell v. R. R.,* 190 N. C., 573.

From a careful reading of the charge, it was exceptionally fair to the parties to the action.

We find no prejudicial or reversible error.

No error.

C. S. WALTERS v. D. S. ROGERS ET AL.

(Filed 22 January, 1930.)

1. **Bills and Notes D c—Extension of time for payment of note does not release surety when he has expressly contracted to remain bound thereon.**

   While ordinarily an extension of time granted the maker of a note will discharge the sureties from liability thereon, this principle does not apply when the sureties have agreed thereto or have signed the note specifying that such extension will not operate to discharge them from liability, and when the creditor at the time of granting the extension expressly reserves his rights against the sureties.

2. **Novation A a—Taking additional security for note and granting extension of time thereon is not a novation and does not release sureties.**

   Where the sureties on a note agree by the terms of the note that an extension of time granted to maker would not discharge them from liability thereon, the taking by the payee of a mortgage expressly providing that it was additional security to the note and granting an extension of time for payment cannot be construed as a novation, and the sureties are not released thereby, the word novation implying the extinguishment of an existing debt and the creation of a new one.

APPEAL by defendant Lawson from *Moore, Special Judge,* at July Term, 1929, of STOKES.

The defendants executed and delivered to the plaintiff eight notes, maturing at different dates, each in form and figures as follows:

"$1,000.00. Pilot Mountain, N. C., 3 August, 1922.

December first, 1922, after date, we promise to pay to the order of C. S. Walters, one thousand dollars for value received, secured by deed of trust of even date herewith, negotiable and payable, without offset, at Farmers' Bank, Pilot Mountain, N. C., with interest from date at six per cent per annum; and this note may be charged to the account of either maker or endorser at maturity, and the subscribers and endorsers hereby agree to continue and remain bound for the payment of this note, and all interest thereon, notwithstanding any extension of time granted to the principal and notwithstanding any failure or omission to protest this note for nonpayment or to give notice of nonpayment or dishonor or protest to make presentment or demand for payment, hereby expressly waiving any protest and any and all notice of any extension of time or of nonpayment or dishonor or protest in any form, or any notice whatsoever.

Witness my hand and seal. D. S. ROGERS. (Seal.)
GEORGE ROGERS. (Seal.)
M. C. LAWSON. (Seal.)
Witness: DELLA ROGERS." ROXILLA ROGERS. (Seal.)

Upon the pleadings and evidence the following verdict was returned:

1. Was the defendant Christian's intestate of sufficient mental capacity at the time of the execution of the notes sued on, to understand the nature and effect of the transaction? Answer: Yes.

2. Did the defendant, M. C. Lawson, sign the notes sued on, as surety? Answer: Yes.

3. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: $4,484.16, with interest on $4,000 from 3 August, 1922, and interest on $4,484.16 from 15 May, 1928.

Judgment for the plaintiff and appeal by M. C. Lawson upon error assigned.

J. D. Humphries and Folger & Folger for appellant.
W. Reade Johnson and A. C. Davis for appellee.

ADAMS, J. On 3 August, 1922, the defendants executed and delivered to the plaintiff eight notes, each in the sum of $1,000, and to secure their payment the defendants D. S. Rogers and Roxilla Rogers, his wife, executed a deed of trust to W. R. Badgett, trustee, on two tracts of land. On 9 December, 1925, the defendants, George M. Rogers and his wife, executed to W. R. Badgett, trustee, a deed of trust, without notes, conveying two other tracts, the recited consideration being the plaintiff's agreement to extend the time for the payment of the notes secured by the first deed of trust. The plaintiff is a party to this instrument. The appellant contends that by virtue of the latter deed of trust and the recitals therein he was released from liability on the notes he signed. The two questions are whether he was discharged either by novation or by an extension of the time of payment.

There can be no doubt of the general rule that a nonassenting surety in a negotiable instrument is discharged from liability when the creditor makes a valid contract with the principal debtor to postpone the day of payment and thereby puts it beyond the power of the surety to pay the debt and sue the principal. But, if at the time the extension is granted to the principal, the creditor expressly reserves his remedies against the surety, the latter will not be discharged—this on the theory that in such event the surety could pay the debt and sue the principal, although the creditor could not. *Scott v. Harris,* 76 N. C., 205, 208; *Chemical Co. v. Pegram,* 112 N. C., 614; C. S., 3102. In the second deed of trust the plaintiff reserved his rights against the sureties in these words: "It is understood that the party of the third part (the plaintiff) is taking this as additional security and that no rights under the original deed of trust or notes are hereby waived or in any way released." Besides, when the appellant signed the notes he expressly contracted to remain bound for

their payment notwithstanding any extension of time granted to the principal. This is a valid and enforceable agreement. *Bank v. Couch,* 118 N. C., 436; *Fitts v. Grocery Co.,* 144 N. C., 463.

That the acceptance of the second deed of trust did not constitute a novation is manifest. Novation implies the extinguishment of one obligation by the substitution of another; but the plaintiff, as already pointed out, instead of extinguishing the debt represented by the notes and the first deed of trust, expressly reserved all his rights and took the second deed as additional security. There is

No error.

C. A. GEORGE v. JOHN H. SMATHERS AND JOSEPHINE SMATHERS.

(Filed 22 January, 1930.)

Party Walls B a—Party building party wall may recover half its cost from adjacent owner using same—Termination of easements therein.

Where the owner of lands builds a party wall partly upon his own lands and partly on the lands of the adjacent owner, and the latter builds to and uses the same: *Held,* equity implies that he will pay for such use one-half the cost of constructing the wall, although no express contract has been made concerning it, and upon the accidental destruction of the wall all easements therein terminate.

APPEAL by defendant, John H. Smathers, from *Harwood, Special Judge,* and a jury, at May Term, 1929, of HAYWOOD. No error.

The action grew out of a party wall being destroyed accidentally by fire.

The issue submitted to the jury, and their answer thereto, was as follows:

"Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: $513.92."

Alley & Alley for plaintiff.
Jos. E. Johnson for defendant, John H. Smathers.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence defendant moved for judgment as in case of nonsuit. C. S., 567. The court below overruled the motions and in this we can find no error. *George v. Smathers,* 196 N. C., 514.

The court below charged the jury as follows: "The law in this State is that where one adjoining owner constructs a party wall, one-half on his own land and one-half on the land of the adjoining owner, and the

adjoining owner fails to contribute to the expense or the cost of the wall, after the wall has been built by the party in question and the adjoining property owner joins his building to the wall and uses it—makes use of it without paying the man who built the wall his half of the costs of the wall—the man who builds the wall can bring his action against the man who owns the adjoining land, and the man who is using the wall without paying for his half, and recover for half the costs of the wall. Therefore, in this case, if you are satisfied from this evidence, and by its greater weight, that the plaintiff, C. A. George, constructed a party wall on the line between himself and Dr. Smathers; and if you should find that after the wall was completed, or before the wall was begun, or during the period of its construction, the plaintiff, C. A. George, asked the defendant, J. H. Smathers, to contribute his half of the costs of the wall, and if you should further find from the evidence, after the wall was built and paid for by the plaintiff, George, that Dr. Smathers erected a building on his lot, adjoining the lot owned by the plaintiff, George, and attached his building to the wall built by the plaintiff and used the wall built by George, then George would be entitled to recover from Dr. Smathers for one-half of the costs of that wall."

The defendant excepted and assigned error to the foregoing charge. The assignment of error cannot be sustained.

We think the case of *Reid v. King,* 158 N. C., 85, is practically on all-fours with the case at bar, and fully sustains the charge of the court below.

"Contracts implied in law, or more properly *quasi* or constructive contracts, are a class of obligations which are imposed or created by law without regard to the assent of the party bound, on the ground that they are dictated by reason and justice, and which are allowed to be enforced by an action *ex contractu.* They rest solely on a legal fiction, and are not contract obligations at all in the true sense, for there is no agreement; but they are clothed with the semblance of contract for the purpose of the remedy, and the obligation arises not from consent, as in case of true contracts, but from the law or natural equity. So, when the party to be bound is under a legal obligation to perform the duty from which his promise is inferred, the law may infer a promise even as against his intention." 13 C. J., at p. 244. See *Cole v. Wagner,* 197 N. C., 692.

We do not think the court below erred in sustaining the plaintiff's motion for judgment as in case of nonsuit on the counterclaim.

The controversy arose over the accidental destruction of the original building by fire. When buildings are destroyed, with party walls, ordinarily this puts an end to any easement. The parties by operation of law are put in *status ante.*

In 20 R. C. L., sec. 9, at p. 1088, it is said: "Where a wall is erected half upon each side of the line dividing two properties, and used as a party wall, the easement of support existing in favor of the respective owners in the half of the wall on the other's land ceases at the moment of their accidental destruction, because of the termination of the necessity which gave rise to the easement. If houses having a party wall are accidentally destroyed by fire, leaving the wall standing, the easement in the wall ceases and either owner may dispose as he pleases of the part on his ground."

In 30 Cyc., p. 779, we find: "The easement of support by means of the common party wall, which belongs to adjoining buildings, ceases with the state of things which created it, when the wall is accidentally destroyed, or is so much decayed as to require rebuilding from the foundation."

In the case of *Heartt v. Kruger,* 9 L. R. A., p. 135 (2d headnote) it is held: "The accidental destruction of a party wall, as to the maintenance of which there has been no grant of a perpetual right, will destroy all right in either party to claim an easement in the property of the other for the further support of a party wall notwithstanding some portion of the foundation of the old wall remains standing."

We think the facts in reference to the counterclaim come within the above principles of law. Looking through the entire evidence and the law of this and other jurisdictions, we see in the judgment

No error.

FLORA REEL, ADMINISTRATRIX OF W. R. REEL, DECEASED, v. T. J. BOYD.

(Filed 22 January, 1930.)

Limitation of Actions B a: Partnership F a—Entry on account by surviving partner is not partnership act and does not affect running of statute.

A partnership terminates upon the death of one of the partners, C. S., 3277, and where an open, mutual and current account has existed between the partnership and another and the surviving partner continues to run the partnership and enters items on the account, which are not necessary to the winding up of the partnership affairs, such acts after the termination of the partnership are not partnership acts and the statute of limitations will run on the account due the terminated partnership from the last item entered thereon before the death of the deceased partner.

CIVIL ACTION, before *Daniels, J.,* at April Term, 1929, of PAMLICO.

Summons was issued on 12 September, 1927, and served on 1 October, 1927. W. R. Reel and E. D. Reel were partners engaged in the mercan-

tile business in Arapahoe, Pamlico County, North Carolina, under the firm name of W. R. Reel & Bro. The defendant on various dates from June, 1917, to 1 December, 1924, purchased goods, wares and merchandise from said partnership and made various payments on said account, both in cash and by delivering cotton and other commodities to said partnership. It seems to be conceded that the account between the parties was a mutual, open and current account. W. R. Reel died intestate 7 May, 1924, and the plaintiff was duly appointed administratrix of his estate on 2 June, 1924. Apparently, the business was continued by the surviving partner until 27 November, 1925, when a petition was filed in the Superior Court by the surviving partner and the plaintiff and the heirs and distributees of W. R. Reel, deceased, for the purpose of dividing and disposing of the property belonging to the partnership. An order was duly made conveying certain property of the partnership to E. D. Reel, surviving partner, as his share in the partnership assets, and certain property was conveyed and delivered to the plaintiff, including the account against the defendant. Thereafter, on 12 September, 1927, the plaintiff brought a suit against the defendant on said account, claiming that there was a balance due by the defendant amounting to $683.06. The defendant pleaded payment, and also the three-year statute of limitations.

The pertinent part of the judgment is as follows: "The court having announced that he would hold that the distributees and heirs at law of W. R. Reel having been made parties at the November Term, 1928, and having adopted the complaint filed by the administratrix as their complaint, and the statute of limitation having been pleaded by the defendants, that the claims of the said distributees are barred by the statute of limitation, to which ruling the plaintiffs except and in deference to the intimation of the court move to take a nonsuit and appeal to the Supreme Court."

D. L. Ward and Z. V. Rawls for plaintiff.
F. C. Brinson for defendant.

BROGDEN, J. The death of a partner terminates a partnership, and the surviving partner, under the statute and decisions of this Court, is charged with the duty of reducing the personal property to cash and settling the partnership affairs. C. S., 3277 *et seq.; Bank v. Hollingsworth,* 135 N. C., 556, 47 S. E., 618; *Sherrod v. Mayo,* 156 N. C., 144, 72 S. E., 216; *Irvin v. Harris,* 182 N. C., 656, 109 S. E., 871. Therefore, the surviving partner was empowered to collect the account due by the defendant to the partnership.

The plaintiff, however, contends that the business was continued by the surviving partner, and that there were mutual transactions between the surviving partner and the defendant as late as December, 1924, and that, as this action was instituted in September, 1927, the account was not barred by the statute of limitations. The principle of law applicable to such a situation was declared in *Walker v. Miller,* 139 N. C., 448, 52 S. E., 125. The Court declared: "The fact that they chose to carry on the business under the name of the old firm, does not change their rights. They could, if they had so preferred, selected any other name. Of course, the old firm, as originally constituted, was dissolved by the death of the partners. Whether the parties so intended or not, the legal effect of what they did was to create a new and original arrangement for carrying on business, the capital of which was contributed by the beneficial owners of the property. . . . It is not uncommon for a business which, by reason of the credit and reputation for integrity of the founders, possesses value to be conducted, after their death, under its original name. In such cases it is the business of the living owners, and contracts made by or with them, under the name adopted, have all the force and effect as if made in the names of the individuals to whom it belongs."

In view of this principle of law, it is obvious that the dealings between the parties after the death of W. R. Reel in May, 1924, would not have the effect of preventing the bar of the statute of limitations as to all items of the account prior to the death of the partner. Thus, in *Irvin v. Harris, supra,* it was held that "payments made on these notes by the surviving partner, after the partnership was dissolved by the death of H. C. Harris, cannot operate to keep alive or renew against the estate of a deceased partner, claims which, except for such payments, would be barred by the statute of limitations."

The decisions upon the subject rest upon the theory that independent transactions after the death of a partner constitute no part of the partnership assets, except, of course, in cases in which future dealings between the parties are necessary to complete existing contracts or as an incident of winding up partnership affairs. No such condition, however, is presented by this record. We are therefore of the opinion that the judgment was correct.

Affirmed.

STATE OF NORTH CAROLINA EX REL. H. GRADY GOODE ET AL. v. CHASE BRENIZER ET AL.

(Filed 22 January, 1930.)

1. Schools and School Districts D a—Statutes in regard to the election and appointment of school commissioners of Charlotte construed.

The act of the Legislature, chapter 142, Private Laws of 1929, amending chapter 78, Private Laws of 1923, providing for the election and appointment of the school commissioners of a certain city has the effect of modifying C. S., 2900, and the board of school commissioners should be elected or appointed, in case of vacancy, according to the provisions of chapter 78, Private Laws of 1923, as amended by the act of 1929.

2. Statutes C a—Private act held to modify prior general statute.

Ordinarily an act of the Legislature will be construed as a modification of a former general act as to the appointment and election of municipal officers when otherwise it would be meaningless.

APPEAL by defendants, Chase Brenizer, W. R. Foreman, J. A. Houston and J. W. Cole, from *Shaw, J.*, at October Term, 1929, of MECKLENBURG.

Civil action in the nature of *quo warranto* to try title to offices of school commissioners of the city of Charlotte, submitted on an agreed statement of facts.

Prior to the election held in the city of Charlotte on 12 March, 1929, at which "Plan D," as provided by the Municipal Corporation Act of 1917, C. S., 2887, *et seq.*, was duly adopted by the voters of said city, the defendants constituted the board of school commissioners of the city of Charlotte under laws previously adopted by the voters, which also provided for the election of said board by the people.

The first and second provisos of C. S., 2900, incorporated in "Plan D," are as follows: *"Provided, however,* that if any city adopting this form of government shall have, at the time of such adoption, a board of education acting under powers and regulations given it by a vote of the voters of such city, such board of education shall remain in existence and the powers and duties given it by a vote of the people shall be and remain in full force and effect, except that the appointment of the members of such board of education shall vest in the council: *Provided further,* that in all cases wherein the said board of education is now elected by the people, such board shall continue to be elected by the electors of the municipality at the same time and in the same manner as the city council is elected, as herein provided."

On the same day that "Plan D" was voted upon in the city of Charlotte, the General Assembly, then in session, enacted chapter 142, Private

Laws, 1929, as an amendment to chapter 78, Private Laws, 1923, which provides that any vacancy in the board of school commissioners for the city of Charlotte shall be filled by said board until the next general election, when a successor is to be elected for the remainder of the unexpired term, but the act was not to apply to present appointees, and all laws and clauses of laws in conflict therewith were repealed.

On Tuesday after the first Monday in May, 1929, an election was duly called in the city of Charlotte for the purpose of electing the five members of the city council, as provided by "Plan D," and the municipal board of elections ruled that there should also be elected at said election seven members of the board of school commissioners of said city.

The plaintiffs contend that they were duly elected members of the board of school commissioners for the city of Charlotte at said election, and as such they have made demand upon the defendants for the possession of all books, papers, records and property belonging to said board of school commissioners, which demand has been refused.

The defendants contend that they were not affected by said election, in which they took no part, and that they still lawfully constitute the board of school commissioners for the city of Charlotte.

From a judgment in favor of the plaintiffs, the defendants, Chase Brenizer, W. R. Foreman, J. A. Houston and J. W. Cole, appeal, assigning error.

John M. Robinson and Hunter M. Jones for plaintiffs.
W. T. Shore and Cansler & Cansler for defendants.

STACY, C. J., after stating the case: The case turns upon the question as to whether chapter 142, Private Laws, 1929, has the effect of modifying C. S., 2900 so as to provide for the election and appointment in case of vacancy, of members of the board of school commissioners of the city of Charlotte according to the provisions of chapter 78, Private Laws, 1923, as amended by said act of 1929. We think it does, else said act would be meaningless, and it is to be presumed that the Legislature intended something by its enactment. Such would seem to be its reasonable import. *Felmet v. Commissioners,* 186 N. C., 251, 119 S. E., 353. It follows, therefore, from this view of the matter, that the action of the plaintiffs should have been dismissed.

Error.

WACHOVIA BANK AND TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF W. L. BLACK, DECEASED, v. AGNES MAE BLACK, WIDOW OF SAID W. L. BLACK.

(Filed 22 January, 1930.)

1. **Husband and Wife G a—Executor of husband is liable for one-half of amount of joint note given for purchase price of land held by entireties.**

   Where the husband purchases lands and takes title to himself and wife by entireties, and they execute a mortgage on the lands to secure the balance of the purchase price, and the husband dies leaving a will from which his wife dissents: *Held*, as between the wife and the executor of the husband they are liable as joint makers of the note, each for half thereof unaffected by the wife's dissent from the will, although she takes title to the whole of the lands as the survivor.

2. **Same—Husband and wife are jointly and severally liable on joint note given for purchase price of land held by the entireties.**

   Where the husband and wife are joint makers of a note secured by their mortgage for the balance of the purchase price of lands held by them by entireties, their liabilities on the note are joint and several, C. S., 458, 3041, 3166, and upon the payment of the note by one of them the other may be held liable for contribution, the incidents of the estate not being incidents of the note.

3. **Same—Execution against land held by entireties may be had on judgment on joint note given for purchase price.**

   Under judgment against a husband and wife upon their joint note given for the balance of the purchase price of lands held by them by entireties, execution may be issued against the land so held.

APPEAL by plaintiff and defendant from a judgment of *Schenck, J.*, rendered at June Term, 1929, of BUNCOMBE, upon an agreed statement of facts submitted as a controversy without action under C. S., 626. Affirmed.

Bourne, Parker & Jones for plaintiff.
Fortune & Fortune for defendant.

ADAMS, J. W. L. Black and Agnes Mae Black were husband and wife. The husband bought some land and had it conveyed to his wife and himself. Thereupon they executed a deed of trust on real property securing three notes given by them for the purchase price. W. L. Black paid the first two notes, but died leaving the third unpaid. This note was given to Fairy Owens and husband for $3,000, was dated 22 December, 1925, was payable three years after date, was under seal, and was in the usual form. It contained the recital, "For value received we promise to pay," etc.

W. L. Black made a will appointing the plaintiff his executor and trustee and his widow dissented; but the dissent, it will be seen, is not decisive of the controversy or even material to its determination.

After the plaintiff qualified as executor a question arose as to the liability of the parties to the payees of the note. The plaintiff contended that Black and his wife took an estate by the entirety and that upon the husband's death the wife, as survivor, became the sole owner of the land and is solely liable on the note; or, if not solely liable that she is liable to the extent of one-half the amount due. The defendant contended that she is not liable at all, but if liable, in no event for more than one-half the note.

Upon an agreed statement of facts the controversy was submitted to the Superior Court of Buncombe County and Judge Schenck adjudged that W. L. Black and his wife, by the execution of the note became jointly and severally liable, and that as between the parties the plaintiff is liable to the payment of one-half the note, with interest, and that the defendant is liable to the payment of one-half, with interest. Both parties excepted to the judgment and appealed.

This is an adjudication of the liability of the makers of the note as between themselves, not an adjudication of their liability to the payees. In attacking the judgment the plaintiff suggests that Mrs. Black acquired title to the land (and, indeed, to two other lots which were purchased in like manner and paid for by the husband) as the trustee of a resulting trust. But this position is not defensible. If a husband purchase land with his wife's money and take title in his own name he will usually be declared the trustee of a resulting trust, enforceable by the wife; but if he purchase land with his own money and have the title conveyed to his wife the relation between them will raise the presumption of a gift or of a provision for her support. *Tyndall v. Tyndall,* 186 N. C., 272; *Ricks v. Wilson,* 154 N. C., 282; *Arrington v. Arrington,* 114 N. C., 116.

The quality of the estate by the entirety was not affected by Mrs. Black's dissent from her husband's will. He knew that if she survived him her title could not be divested by his testament. *Todd v. Zachary,* 45 N. C., 286. As indicated, the only question is the liability of the parties *inter se.*

It is unnecessary to summarize the incidents of this anomalous estate. They are comprehensively set forth in *Davis v. Bass,* 188 N. C., 200. If the note in question had been reduced to judgment against the makers an execution could have been issued against the estate which they held by the entirety. *Johnson v. Leavitt,* 188 N. C., 682. This is so because they held the estate under the five-fold unity of interest, title, time, possession, and person. Under the common-law fiction of a unity of person

each was seized of the whole and not merely of a part of the estate. But it does not follow that the judgment could have been collected only out of the estate by the entirety. The note does not recite a special consideration; it was given "for value received" and was "secured by a deed of trust on real estate." The makers were primarily liable jointly and severally. C. S., 458, 3041, 3166; *Roberson v. Spain,* 173 N. C., 23. The unity of person is an incident of the estate created by the conveyance to Black and his wife; it is not incident to the note. As the makers were jointly and severally liable, payment of the whole amount by either would entitle the other, or his representative, to contribution—an equity which arises when one of several parties who are liable on a common debt discharges the obligation for the benefit of all. It results that as between themselves each party is liable for one-half the debt, although the whole title is vested in the defendant as the survivor. The judgment is

Affirmed.

AREY BRICK AND LUMBER COMPANY v. F. W. WAGGONER, TRUSTEE, AND JULIA MAE WAGGONER.

(Filed 22 January, 1930.)

1. **Mortgages H p—In this case held: there was no evidence of fraud in execution of power of sale in trust deed and sale was valid.**

   Where a deed of trust on land is executed to secure payment of two notes, given to different creditors, providing for the sale of the land at auction by the trustee upon default in payment of principal or interest on the notes it secured after advertisement according to law, upon the execution of the power of sale by the trustee according to the terms of the deed and the bidding in of the property by the wife of the mortgagee and daughter-in-law of the trustee: *Held,* the sale will not be set aside in a suit by one of the creditors secured by the deed, there being no evidence of fraud upon which the sale is sought to be set aside.

2. **Same—There is a presumption in favor of the regularity of the execution of the power of sale in a deed of trust.**

   There is a presumption in favor of the regularity of the execution of the power of sale in a deed of trust or mortgage.

CIVIL ACTION, before *Harding, J.,* at May Term, 1929, of ROWAN.

On 21 January, 1927, S. M. Broadway and wife executed and delivered two promissory notes, one in the sum of $1,415.75, payable to J. M. Waggoner, and another for $305.17 to the plaintiff, Arey Brick and Lumber Company. Both notes were secured by a mortgage executed by Broadway and wife to F. W. Waggoner, trustee. The mortgage provided that the makers of the notes were to pay $30 per month on the indebted-

ness, and that $15 thereof was to be applied on the note of the plaintiff each month until paid in full, and then the sum of $30 was to be applied to the payment of the J. M. Waggoner note. The first installment of $30 was to be due 1 February, 1927, "and a like installment on the first of each and every month after until the whole amount of the above mentioned notes has been paid."

The mortgage further provided that if Broadway and wife "shall fail to pay the principal and interest on said indebtedness, or any installment of either, as same becomes due, . . . it shall be lawful for and the duty of said party of the second part (trustee) to sell said premises, as a whole or in subdivisions, at public auction, at the courthouse door in Salisbury, North Carolina, after due advertisement as provided by law for mortgage sales."

In the brief of defendant it is stated that the mortgage deed contains a provision as follows: "It shall be lawful for, and the duty of the said party of the second part (trustee) upon demand of the holder of the indebtedness or any part thereof, or any party interested therein to advertise as provided by law for mortgage sales," etc. However, the record before us does not disclose any such provision. The evidence tended to show that J. M. Waggoner, the holder of one of the notes, notified F. W. Waggoner, the mortgagee or trustee, that the makers of the notes "were not paying on the note and he wanted to sell the house and lot," etc. Thereupon, F. W. Waggoner, trustee, duly advertised the property and sold the same at public auction in accordance with the terms of said mortgage on 17 December, 1927, at which time Julia Mae Waggoner, wife of J. M. Waggoner, and daughter-in-law of the trustee, purchased the land for $25, assuming the payment of a first mortgage of $2,500, held by Davis and Wily Branch Atlantic Bank and Trust Company. The sale remained open for ten days and no increased bid having been placed upon the purchase price, the trustee executed and delivered a deed for the premises to the purchaser. Thereafter, the plaintiff filed a petition to set aside said deed, alleging that the property was really worth $4,000, and "that the circumstances surrounding the sale and manner in which the same was conducted caused a fraud to be perpetrated upon petitioner by respondents herein named; that the acts and conduct of respondents were intended to deceive, calculated to deceive, did deceive your petitioner, and the respondents benefited thereby, and your petitioner was damaged thereby; and that therefore the said sale and deed to Julia Mae Waggoner are null and void and of no effect."

C. P. Barringer for plaintiff.
Walter H. Woodson for defendant.

BROGDEN, J. The mortgage contained a power of sale, which power was to be exercised upon default in the payment of installments of indebtedness, and the evidence discloses default in the payment of the installments and demand made upon the mortgagee to sell the land described in the mortgage.

The plaintiff seeks to set aside the deed of the mortgagee, made pursuant to the terms of the mortgage, upon the ground of fraud. There was no evidence of fraud introduced at the hearing, and therefore the judgment of nonsuit was properly entered. Furthermore, in the absence of evidence to the contrary, there is a presumption in favor of the regularity of the execution of the power of sale in a mortgage or deed of trust. *Jenkins v. Griffin,* 175 N. C., 184, 95 S. E., 166; *Brown v. Sheets,* 197 N. C., 268.

Affirmed.

D. W. McFADDEN v. A. J. MAXWELL, COMMISSIONER OF REVENUE, ET AL.

(Filed 22 January, 1930.)

Taxation A a—Action to recover amount paid as license tax is removable to Wake County on motion of Commissioner of Revenue.

License taxes assessed by the Commissioner of Revenue are assessed and payable in his office in Wake County, and where a person who has paid a license tax so assessed demands its refund and brings action to recover the amount paid on the ground that the tax was wrongfully assessed against him, his cause of action arose in Wake County, and where the suit is brought in the court of another county it is removable to Wake County upon motion of the Commissioner, C. S., 464, subject to the power of the court to change the place of trial as provided by C. S., 471.

APPEAL by defendants from order of *Schenck, J.,* at May Term, 1929, of BUNCOMBE. Reversed.

This action was begun in the Superior Court of Buncombe County to recover the sum of $420, paid by the plaintiff, a resident of said county, to the defendant, the Commissioner of Revenue of North Carolina. The said sum of money was demanded of plaintiff by said Commissioner of Revenue as a license tax assessed against the plaintiff under the provisions of section 209(c) of chapter 80, Public Laws of North Carolina, 1927.

In his complaint plaintiff alleges that said license tax was wrongfully and unlawfully assessed against him and that plaintiff paid the same under protest, in writing, and immediately demanded the return of the sum of money so paid by the said Commissioner of Revenue. Upon the

refusal of said demand, this action was begun in accordance with the provisions of section 464, chapter 80, Public Laws of North Carolina, 1927.

The action was heard upon defendant's appeal from the order of the clerk of the Superior Court of Buncombe County, denying defendant's motion made in apt time, that the action be removed from the Superior Court of Buncombe County to the Superior Court of Wake County, for trial, in accordance with the provisions of C. S., 464.

From the order of Judge Schenck, affirming the order of the clerk, and denying their motion for the removal of the action for trial, defendants appealed to the Supreme Court.

Ward & Allen for plaintiff.

Attorney-General Brummitt and Assistant Attorney-General Siler for defendants.

CONNOR, J. The only question presented by this appeal is whether there was error in the refusal of defendants' motion for the removal of the action, for trial, from the Superior Court of Buncombe County, where the action was begun, to the Superior Court of Wake County, where defendants, public officers, who are sued by reason of their official acts, allege that the cause of action upon which plaintiff demands relief, arose. If there was error in the order refusing the motion, the order must be reversed; otherwise, it must be affirmed.

Ordinarily, and subject to statutory provisions not applicable to the instant case, an action begun and pending in the Superior Court of the county in which the plaintiff resides, must be tried in said county. C. S., 469. Where, however, the action is against a public officer, and the cause of action is founded upon his official acts, the action must be tried in the county where the cause of action, or some part thereof, arose, subject to the power of the court to change the place of trial, in cases as provided by law. C. S., 464. If the action against a public officer is begun in the Superior Court of a county other than that in which the cause of action arose, it may nevertheless be tried in said county, if the defendant does not, in apt time, file a motion for its removal to the proper county. By failure to file such motion, he waives the right of removal, and the action may be tried in the county in which it was begun and is pending. *Ragan v. Doughton,* 192 N. C., 500, 135 S. E., 328. Actions against State officers, authorized by statute, to recover sums paid as taxes, upon the allegation that the tax was invalid or wrongfully and unlawfully assessed, have generally been brought in Wake County. *Tea Co. v. Doughton,* 196 N. C., 145, 144 S. E., 701. The question to be decided on this appeal does not seem to have been heretofore presented to this Court.

License taxes, assessed by the Commissioner of Revenue of this State, under statutory authority, are due and payable at his office in the city of Raleigh, in Wake County. When such taxes are paid, they are paid, usually in fact, and always in contemplation of law, in Wake County. Where a person, who has paid a license tax assessed against him by the Commissioner of Revenue of the State, brings an action against said Commissioner to recover the amount paid on the ground that the tax was wrongfully and unlawfully assessed against him, he must allege as facts constituting his cause of action, payment of the tax, and demand upon the Commissioner for its refund. Both the payment of the tax and the demand are made in Wake County where, as required by statute, the Commissioner maintains his office, and where his official duties are performed. If the action, as authorized by the statute (section 464, Public Laws of N. C., 1927) is begun in the Superior Court of a county other than Wake County, the Commissioner is entitled as a matter of right to have the action removed to the Superior Court of Wake County for trial, under the provisions of C. S., 464, subject to the power of said court to change the place of trial in cases as provided by law. C. S., 471.

A sound public policy forbids that a public officer, when sued upon a cause of action founded upon his official conduct, should be required to leave his office, and attend courts in distant counties, to defend the action. McIntosh N. C. Prac. & Proc., p. 267. As said in *Cecil v. High Point,* 165 N. C., 431, 81 S. E., 616: "The private convenience must yield to the public good." If the law were otherwise, the State's business, which must be performed by its officers at their offices in the city of Raleigh, in Wake County, would suffer because of the absence of these officers from their offices, in attendance upon courts of other counties.

Defendants' motion for the removal of this action from the Superior Court of Buncombe County to the Superior Court of Wake County should have been allowed. For error in refusing the motion, the order must be

Reversed.

J. LONDON AND SOLOMON ROBINOWITZ, EXECUTORS OF JOSEPH ARLICH, DECEASED, ET AL. v. CHAIM PELCHENAN, TRUSTEE, ET AL.

(Filed 22 January, 1930.)

Wills E i—Executor may bring action for construction of will by the court.

The courts of the State have jurisdiction to hear and determine an action to construe a will, and the construction of the will may be given by the court in caveat proceedings after the determination of the validity of the will in favor of the propounders.

LONDON *v.* PELCHENAN.

APPEAL by plaintiff from *Moore, J.,* at August Term, 1929, of GUILFORD. Affirmed.

This action was begun in the Superior Court of Guilford County.

Plaintiffs, upon the facts alleged in their complaint, pray for the advice of the court with respect to the performance of their duties in the administration of the estate of their testator.

From judgment approving a contract which the plaintiffs propose to enter into with the heirs at law and distributees of their testator, in settlement of their claims against said estate, and otherwise advising and approving the conduct of the plaintiffs, in the performance of their duties, plaintiffs appealed to the Supreme Court.

D. C. MacRae, Gold & York and Frazier & Frazier for plaintiffs.
R. M. Robinson and S. J. Stern for defendant.

CONNOR, J. Joseph Arlich died 15 September, 1925. A paper-writing was thereafter probated in common form as his last will and testament by the clerk of the Superior Court of Guilford County, North Carolina. By his said last will and testament the said Joseph Arlich devised and bequeathed all his property, real and personal, to the trustee named therein, to be held and disposed of by said trustee in accordance with the terms and provisions of the trust created by the said Joseph Arlich in his said last will and testament. No part of his property was devised or bequeathed in said last will and testament to persons who are his heirs at law or distributees. The executors named in said last will and testament have qualified for the performance of their duties and are now engaged in the administration of the estate of their testator.

Serious questions have been raised by persons who claim to be the heirs at law and distributees of the estate of Joseph Arlich, deceased, touching the validity of said last will and testament, and also affecting its construction. The executors and the testamentary trustee have entered into negotiations with such persons, and have agreed, subject to the approval of the court, upon a settlement of these questions. This settlement has been reduced to writing and in this action is submitted to the court for its approval. The defendants in this action are all the beneficiaries of the trust created by the will, and all the heirs at law and distributees of the testator. The court upon consideration of the facts found by it, rendered judgment approving the settlement made by the executors with the heirs at law, and distributees of their testator, and also approving the administration of the estate by the executors involved in said settlement.

The only question presented on the appeal of plaintiffs to this Court is whether the court has jurisdiction of the action. This question is

answered in the affirmative upon the authority of our decision in *Trust Co. v. Lentz,* 196 N. C., 398, 143 S. E., 776. In that case it is said: "The right of the plaintiff to bring this action and to seek the advice of the court on an existing state of facts, upon which a decree or some directions in the nature of a decree may be founded, is supported by a number of decisions, notably *Balsley v. Balsley,* 116 N. C., 472, 21 S. E., 594; *Tyson v. Tyson,* 100 N. C., 360, 6 S. E., 707; *Little v. Thorne,* 93 N. C., 69, and *Tayloe v. Bond,* 45 N. C., 5.

We have read the judgment rendered in this action. It is well considered, and is in all respects

Affirmed.

CHARLES W. FALLS v. MONARCH COTTON MILLS COMPANY.

(Filed 22 January, 1930.)

Master and Servant C c—Evidence that injury was caused by act of fellow-servant held sufficient to be submitted to jury and sustain their verdict in defendant's favor.

Where in an action by an employee to recover damages for a negligent injury the evidence is conflicting as to whether the explosion of the barrel resulting in the injury in suit was caused by the negligent act of a foreman or a fellow-servant, the submission of the question to the jury is proper, and judgment upon their answer to the issue of the defendant's negligence in the negative will be sustained.

CIVIL ACTION, before *Cowper, Special Judge,* at May Special Term, 1929, of GASTON.

Plaintiff offered evidence tending to show that the defendant in the course of its business used a large iron pot for heating water to be used in scrubbing floors in its mill. This pot had a screen about it to prevent the escape of fire. The plaintiff was an ordinary laborer and a part of his duties consisted in scrubbing floors. The screen about the pot was made from "old steel drums" or barrels. These barrels were cut open and placed around the pot. There was a barrel in front to protect the legs of the workmen from being burned while dipping water from the pot. On the evening before plaintiff was injured the old screen had been taken away, and the plaintiff was directed to fix a new screen. He testified: "I split the drums open, hammered them out, and stood them around the fire." After doing this the plaintiff left and his brother Tom Falls placed another barrel or drum at the front opening in the background or screen. Tom Falls testified that Caldwell told him to place the barrel at that point. Caldwell, who was a witness for plaintiff,

denied that he was a boss or a foreman, or that he told Tom Falls to place the barrel in front of the screen. Early next morning about 4:30 a.m., plaintiff made a fire which had burned down, and he was building another around the pot when the barrel exploded, and as a result thereof, plaintiff suffered serious and permanent injury.

Issues of negligence, contributory negligence, and damages were submitted to the jury, and the jury answered the issue of negligence in the negative.

From judgment upon the verdict the plaintiff appealed.

S. D. Dolley and A. C. Jones for plaintiff.
George B. Mason for defendant.

BROGDEN, J. The plaintiff offered evidence tending to show that the barrel which caused the injury, was negligently placed near the fire by order of a foreman or boss of defendant, and that this barrel was unsafe—thus rendering the place of work unsafe and dangerous. There was evidence that the barrel was voluntarily selected and set in position by fellow-servants of plaintiff.

The defendant offered no evidence.

Both views were submitted to the jury, and the issue of negligence was answered in the negative. There is no new or novel proposition of law presented, and a careful examination of the record and briefs discloses no reversible error.

No error.

W. D. COLWELL ET UX. v. MARTIN O'BRIEN ET UX.

(Filed 22 January, 1930.)

Specific performance B a—Tenancy by the curtesy initiate is sufficient interest in land to support specific performance against husband.

Where in a contract by a husband and wife to convey lands of the wife the wife's privy examination is not taken, the interest of the husband as tenant by the curtesy *initiate* is sufficient to support an action for specific performance against him so far as his interest is concerned.

PETITION by defendants to rehear this case, reported in 196 N. C., 508, 146 S. E., 142.

Bellamy & Bellamy, John A. Stevens and I. C. Wright for plaintiffs.
Bryan & Campbell for defendants.

STACY, C. J. Has a tenant by the curtesy *initiate* sufficient interest in land to support an action for specific performance, so far as his interest is concerned, under a contract of sale signed by said tenant and his wife, where the wife's privy examination is not taken? We think so.

While it is true that a husband as tenant by the curtesy *initiate,* under our present Constitution and laws, has no present estate in his wife's land which he may sell or lease, without his wife's joinder, or which may be taken under execution against him *(Cecil v. Smith,* 81 N. C., 285), nevertheless, after birth of issue alive, curtesy *initiate* is still regarded with us as a valuable interest which may ripen into an estate of freehold, or curtesy *consummate* as at common law. *Jackson v. Beard,* 162 N. C., 105, 78 S. E., 6; *Jones v. Coffey,* 109 N. C., 515, 14 S. E., 84; *Walker v. Long,* 109 N. C., 510, 14 S. E., 299. Indeed, in *Thompson v. Wiggins,* 109 N. C., 508, 14 S. E., 301, it was said that "He has, by the curtesy *initiate,* a freehold interest, but not an estate, in the property."

But without regard to the precise interest which a tenant by the curtesy *initiate* may have, the question presently presented is whether the contract of sale, set out in 196 N. C., 508, is valid and capable of being specifically enforced so far as the interest of the male defendant is concerned. We see no valid reason for disturbing the original opinion heretofore filed in the case.

Petition dismissed.

GUY M. THOMAS ET AL. v. Z. V. CONYERS ET AL.

(Filed 22 January, 1930.)

1. Partition B a—In this case held: the transaction constituted a parol partition the validity of which the parties were estopped to deny.

Where before his death the deceased owner of lands has made deeds to separate pieces or tracts of land to each and all of his children, and more than two years thereafter, and after his death, his executrices under a will disposing of his other lands and containing a residuary clause, have found the deeds and had them recorded, and the grantees after the recording of the deeds have entered each upon his or her respective parts as set out in the deed to him or her, exercised the right of absolute ownership, leased, collected rents and paid taxes, and have been parties to legal proceedings wherein they have regarded themselves as owners under the deeds: *Held,* though the deeds of gift are invalid because not registered within two years, the transactions operate as a parol partition of the lands, accepted and acquiesced in by the parties, and they are equitably estopped by their acts and conduct from maintaining that the deeds, or any of them, are invalid.

2. Estoppel C a—Action of the parties in this case held to estop them from denying validity of parol partition.

Where the heirs at law of a deceased owner of lands have accepted and gone into possession of their parts of land under separate deeds executed by the deceased, but kept by him in a bank without delivery until found by his executrices after his death and by them recorded: *Held*, the heirs at law are estopped by their acts and conduct, and are bound by the terms and conditions of their deeds which they have accepted from thereafter successfully claiming that the partition by parol was invalid.

3. Same—Equitable estoppel is distinct from presumption of ouster raised by adverse possession.

The doctrine of equitable estoppel is entirely distinct from the presumption of an ouster created by continuous adverse possession for a period of twenty years.

APPEAL by petitioners from *Moore, J.*, at September Term, 1929, of GUILFORD. Affirmed.

This was a proceeding brought and heard on appeal in the Superior Court before the clerk for partition of land. David E. Thomas, Sr., died 27 January, 1925, leaving a widow, Emma C. Thomas, and the following children: Guy M. Thomas, Ethel Thomas Porter, Jessie Fogle, the petitioners, and Dorothy Thomas Conyers, Mary Belle Thomas Petty, and David E. Thomas, Jr. In January, 1920, and prior thereto, David E. Thomas, Sr., joined by his wife, Emma C. Thomas, executed fourteen deeds of gift whereby he attempted to convey to his several children certain tracts or lots of land which he owned. The name of each grantee and the description of each lot are set out in the petition. Certain of the deeds purport to convey lots with limitations over to contingent remaindermen, including grandchildren who were represented by a guardian *ad litem*. Neither one of these deeds was delivered to the grantee during the lifetime of David E. Thomas, Sr., but all were kept in a lock box in a bank in Greensboro. David E. Thomas made a will, and a few days after his death Emma C. Thomas and Dorothy Conyers, his executrices, filed all the deeds for record in the office of the register of deeds and took them from the office after registration and delivered or mailed them to the several grantees. The widow and the children received these deeds and went into possession of the respective tracts or lots therein described and immediately began to collect rent from the tenants; that is, the widow and D. E. Thomas, Jr., collected rent from several store buildings on the land described in the deed from David E. Thomas to Emma Thomas, without objection by any of the other children until 9 February, 1928, when Emma Thomas made a deed to D. E. Thomas, Jr., who since that time has collected the rent without objection.

Each of the children of said David E. Thomas, except D. E. Thomas, Jr., was given one vacant lot each in fee simple, together with improved real property with limitations similar to those in the deed to D. E. Thomas, Jr., which vacant lots and improved real property were taken by the respective grantees under deeds which were received by the respective grantees more than two years after the date and execution thereof. The said Jessie Thomas Fogle and husband have sold and conveyed the vacant lot which she took under one of said deeds to Richardson Realty, Inc., the deed by which said land was conveyed being recorded.

The defendant, Mary Belle Thomas Petty, has likewise conveyed her vacant lot by deed to Richardson Realty, Inc., dated 14 June, 1926. The petitioner, Guy Monroe Thomas, has conveyed his vacant lot to said Dorothy Conyers by deed dated 2 June, 1924; said Dorothy Conyers in turn has conveyed said lot to C. C. Hudson by deed, and said Hudson has conveyed the same to Richardson Realty, Inc., by a subsequent deed. All of said deeds contained full covenants of seizin and warranty. On 17 March, 1924, Ethel Thomas Porter executed a written lease on the store building on the property which she took under one of said deeds from D. E. Thomas to Ferguson and Grosbayne for one year from 1 April, 1924, at a rental of $540, with an option for renewal for another year.

Ethel Thomas Porter also gave Richardson Realty, Inc., an option upon the vacant lot embraced in one of the deeds executed to her by D. E. Thomas, but said option was not exercised and said property was not purchased under said option by the optionee.

All the children of said D. E. Thomas have since his death treated as their own the respective parcels of land described in the said deeds, have paid taxes on said respective parcels of land, have collected rents from said respective parcels, have conveyed the respective parcels herein set out, and prior to this proceeding asserted no interest in and made no claim to the other tracts or parcels held by the other children and heirs at law of said D. E. Thomas, deceased.

In the year 1927 the said Dorothy Conyers Thomas instituted and prosecuted to a conclusion a proceeding in the Superior Court of Guilford County, in which all of the other children of D. E. Thomas were parties, setting out that one of the tracts of land conveyed to her was her property in fee (subject to contingencies provided in said deed), which proceeding was for the purpose of obtaining permission from the court to apply to repairs and improvements upon said property a sum of money allowed by appraisers for the taking of a strip from the front of her said lot by the city of Greensboro under condemnation proceedings for the widening of Davie Street. In her verified complaint she alleged

that she was the owner of said property, and that she acquired title thereto under deed from D. E. Thomas, dated 3 January, 1920.

In the year 1927 the said Guy Monroe Thomas instituted and prosecuted to a conclusion a proceeding in the Superior Court of Guilford County, in which all of the other children of D. E. Thomas were parties, setting out that one of the tracts of land conveyed to him by one of the deeds was his property in fee (subject to contingencies provided in said deed), which proceeding was for the purpose of obtaining permission from the court to apply to repairs and improvements upon said property a sum of money allowed by appraisers for the taking of a strip from the front of his said lot by the city of Greensboro under condemnation proceedings for the widening of Davie Street. In his verified complaint filed in said proceeding, he alleged that he was the owner of said property as aforesaid and that he acquired title thereto under deed from D. E. Thomas, dated 3 January, 1920.

The executrices named in the will of D. E. Thomas, namely, Dorothy Thomas Conyers (or Hayden) and Emma C. Thomas, duly qualified as such, and sold the lands mentioned in said will and distributed the proceeds as provided by the terms of said will. The executrices treated said deeds as a partition of the lands of the said D. E. Thomas as among his children, and did not undertake to sell the same under the power of sale or divide the proceeds according to the residuary clause of said will. The devisees and legatees in the residuary clause of said will are the six children of said D. E. Thomas. These were all the children of said D. E. Thomas living at his death, and no child of his had died before his death, leaving a child or children surviving. The executrices have paid all debts, all inheritance taxes, all the State taxes, all other claims and demands against the estate of the said D. E. Thomas, and have filed their final account and have been discharged. Under the will of D. E. Thomas they sold real estate other than that described in the deeds heretofore mentioned and distributed the net proceeds thereof to the six children of D. E. Thomas, as set out in the record.

The final account showing said distribution was filed in the office of the clerk of the Superior Court of Guilford County, North Carolina, on 27 August, 1924, and recorded. Checks in full were mailed to each of said respective children, together with a copy of said final account, and received by them, and none of said children filed exceptions to said final account, nor did they otherwise make any objection to the sale under the residuary clause of the will only of the real estate not embraced in the deeds.

On or about 9 February, 1928, Emma Thomas, executed and delivered to David E. Thomas, Jr., a deed for all her right, title and interest in and to the lands described in deed recorded in Book 570, page 324.

During the year 1927 David E. Thomas, Jr., having found that taxes, assessments, water rents and repairs were consuming practically all of the income from said property described in the deed from his father to him, instituted a special proceeding in the Superior Court of Guilford County for the sale of the lands described in said deed; all of the children of D. E. Thomas, Sr., and the husbands and wives of such of them as were married, said children being the same persons as the heirs at law of said D. E. Thomas, Sr., at his death, and the same persons who were devisees and legatees in the residuary clause of the will of the said D. E. Thomas, Sr., were made parties defendant in said proceeding. Other parties defendant to said proceeding were the grandchildren of D. E. Thomas, Sr., then *in esse,* and a guardian *ad litem* was appointed to represent said minors and the persons not *in esse,* and said guardian was personally served with summons and filed answer, and said minors, all being nonresidents, were served by publication.

At the sale under said proceeding, D. E. Thomas, Jr., became the last and highest bidder at public auction for said property and a deed was made to him by R. M. Robinson, commissioner, and has been duly recorded. By mistake and inadvertence, the deed from D. E. Thomas, Sr., to the defendant D. E. Thomas, Jr., recorded in the office of the register of deeds of Guilford County in Book 410, page 34, fixes the beginning point in the description of the property therein conveyed at the northeast corner of the intersection of South Davie and Sycamore streets, whereas, in truth and in fact the true beginning point is at the southwest corner of the intersection of South Davie and Sycamore streets, and a frontage of 115 feet is called for on Davie Street, whereas in truth and in fact said frontage is 109 feet.

It is admitted that in the proceeding entitled "David E. Thomas, Jr., *v.* Guy Monroe Thomas *et al.,*" the present defendant, David E. Thomas, Jr., paid into court in said action the sum of $8,072.60 as the value, as found by the court, of the interest of contingent remaindermen in and to the tract of land involved in said proceeding.

D. E. Thomas, Sr., did not devise or attempt to devise in his last will and testament the lands conveyed to his children and his widow described in the petition in this cause, but considered that he had already given the same to his widow and children respectively by the deeds referred to in the petition.

Upon the facts set out in the record it was adjudged that the error in the deed from D. E. Thomas, Sr., to D. E. Thomas, Jr., be corrected; and further: (1) That the deeds executed by D. E. Thomas and his wife and left in the bank were void (a) because they were not delivered during the lifetime of D. E. Thomas, Sr., and (b) because, being deeds of gift, they were not recorded within two years after their execution.

(2) That D. E. Thomas, Sr., intended to make a partition among his children of the lands described in these deeds. (3) That the deeds constituted a parol partition of the grantor's land, which the children by their conduct accepted, ratified and confirmed, the ownership of each tract being specifically set out. (4) That the clerk pay to D. E. Thomas, Jr., $8,072.60, with interest from 5 March, 1928. The petitioners excepted and appealed. The appeal of the widow and guardian *ad litem* was not prosecuted.

Frazier & Frazier for petitioners.
Hines, Kelly & Boren for Dorothy Conyers and Mary Belle Petty.
F. P. Hobgood, Jr., and R. M. Robinson for D. E. Thomas, Jr.
Hoyle & Harrison for defendant Mrs. Emma C. Thomas.

ADAMS, J. The adjudication that the deeds deposited in the bank are void accords with the contention of the plaintiffs, and the defendants did not appeal. Furthermore, the adjudication is amply supported by former decisions of this Court. *Tarlton v. Griggs,* 131 N. C., 216; *Perry v. Hackney,* 142 N. C., 368; *Booth v. Hairston,* 193 N. C., 278. But the decisive question is whether in this situation the plaintiffs are entitled to the relief they seek. They are not, if in contemplation of law they are precluded from claiming title to the tracts or lots of land which are in possession of the other parties; and they are precluded if they are equitably estopped—if they are barred from asserting title by such conduct as would render their present assertion obviously unjust.

There is a distinction between equitable estoppel and estoppels at common law. The latter include estoppel by record, estoppel by deed, and certain cases of estoppel *in pais* which are recognized in courts of law. Equitable estoppel *in pais* owes its origin and development to the notion of justice promulgated by courts of chancery. It embraces estoppel by conduct which rests upon the necessity of compelling the observance of good faith. Bispham's Prin. Eq., sec. 281 *et seq.* "This estoppel arises when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." *Boddie v. Bond,* 154 N. C., 359, 365.

It is true that a parol partition of land is voidable. *Collier v. Paper Corporation,* 172 N. C., 74. It is likewise true that one who accepts a deed is bound by its terms and conditions. *Fort v. Allen,* 110 N. C., 183.

That the foregoing principles were applied in the present case may be seen by reference to the following paragraph in the judgment: "Al-

though these deeds were void, the fact that they were paper writings definitely describing the respective tracts of land therein set out by metes and bounds, taken together with the acts and conduct of the grantees named therein relative to the tracts described in said deeds, constituted a parol partition of the lands of D. E. Thomas, Sr., among his six children, and the said children, by reason of their accepting and retaining the said deeds, after the registration thereof by the executrices, and by reason of their taking possession of the parcels or tracts of land described in the respective deeds to them, paying taxes on said respective tracts or parcels of land, renting, leasing and collecting rents from said respective tracts or parcels of land, and by selling and conveying some of the said parcels thus allotted to them, and by giving options thereon, and by doing the other acts and things set out in the agreed statement of facts, have thereby adopted, affirmed, ratified and acquiesced in the said parol partition, and have each and all mutually estopped themselves from claiming any of the said tracts or parcels of land described in any of the said deeds in which any of the other children were named as grantees."

The doctrine of equitable estoppel is entirely distinct from the presumption of an ouster created by adverse possession for a period of twenty years. The judgment is

Affirmed.

ED HAMPTON v. REX SPINNING COMPANY.

(Filed 22 January, 1930.)

Judgments L a—Judgment of nonsuit on merits of case bars subsequent action on same cause on substantially the same evidence.

Where a cause of action has been heard under the pleadings upon evidence and a judgment as of nonsuit therein has been entered for insufficiency of the evidence to establish it, and the judgment is not appealed from, but remains upon the trial docket of the Superior Court unimpeached, another action between the same parties on the same cause of action and upon substantially the same evidence is barred by the former judgment which as to the second action is *res adjudicata*, C. S., 415.

CIVIL ACTION for damages for personal injury, heard by *McElroy, J.*, at June Term, 1929, of CHEROKEE.

The facts essential to the presentation of the legal question involved are contained in the judgment, which is as follows:

"This cause coming on to be heard before his Honor, P. A. McElroy, judge holding the courts of said county, at June Term, 1929, in said court, and after the jury has been sworn and empaneled, the pleadings

read, and testimony introduced on behalf of both plaintiff and defendant, and defendant having pleaded in its amendment to its answer in this cause, a former determination or judgment of nonsuit against the plaintiff on the same cause of action and on the same testimony, at April Term, 1928, of said court, from the records and uncontradicted testimony the court finds the following facts:

1. That on 16 May, 1927, the plaintiff in this action, Ed Hampton, instituted an action against the Rex Spinning Company above named by suing out a summons therein which was duly served on said defendant Spinning Company on the 21st day of said month, and on the 27th day of said month, plaintiff duly filed his complaint in said action in the office of the clerk of the Superior Court of said county, to which complaint the defendant filed its answer on 17 June, 1927.

2. That said cause came on for trial at April Term, 1928, of said court, before Honorable Cameron McRae, special judge, and a jury which was duly sworn and empaneled, at which trial the said plaintiff, Ed Hampton, and one J. T. Cowart, were the only witnesses who testified for plaintiff, and at the conclusion of plaintiff's testimony, and after consideration of the cause upon its merits, the court adjudged that the plaintiff, upon all the evidence, was not entitled to recover, and rendered a judgment of nonsuit against the plaintiff, from which plaintiff did not appeal, but which judgment is still in force and unreversed and has been since the date of said trial.

3. That on 29 March, 1929, the plaintiff, Ed Hampton, who is admitted to be the same Ed Hampton who was plaintiff in said former suit sued out another summons against the same defendant, which summons with the complaint of plaintiff therein was duly served on Rex Spinning Company 3 April, 1929, to which complaint defendant on 27 April, 1929, duly filed its answer, and thereafter by leave of the court, after it had overruled the first plea of estoppel set up an amendment to defendant's said answer, and stricken out so much of paragraph two of the second estoppel set up in said amendment as contained the testimony of witness, defendant's amendment to its answer was filed, and upon plaintiff's said complaint and answer of defendant, with its amendment as allowed by the court, the cause came on to be tried at the June Term, 1929, of said court.

4. That after a jury had been chosen, sworn and empaneled, the pleadings read and testimony introduced by both plaintiff and defendant, at the conclusion of the testimony, and upon the undisputed evidence in the case and records introduced, the court finds that the cause of action set up in the present action is the same as that set up in the first action which fully appears from the pleadings in both cases which were introduced in evidence.

5. The court further finds from the uncontradicted testimony of both the plaintiff Ed Hampton and his witness, J. T. Cowart, who were the only witnesses for plaintiff examined on the present trial with reference to said cause of action, that the testimony as to the cause of action was the same in both, except that on the former trial plaintiff testified that Brady was his boss, and on the latter the witness Goodman testified that Brady was under him and over plaintiff, who had orders from Brady.

Whereupon, it is considered, adjudged and decreed by the court that this, the plaintiff's cause of action in this suit, has heretofore been determined adversely to him upon the merits, and that by the judgment in said former cause that the said plaintiff is estopped to prosecute the same cause of action against the same defendant in the present cause, the court holding that the plaintiff is estopped by the former judgment.

It is further considered, adjudged and decreed by the court that the plaintiff take nothing by his action, the same be dismissed, and that this defendant go hence without day."

From the judgment rendered plaintiff appealed.

J. D. Mallonee and Moody & Moody for plaintiff.
Dillard & Hill for defendant.

BROGDEN, J. Does a judgment of nonsuit, duly entered by a judge of the Superior Court, upon the merits of the cause, and after all the evidence has been introduced by plaintiff, become determinative and conclusive in a new action brought under C. S., 415, upon the same complaint and upon the same evidence?

The plaintiff contends that C. S., 415, permits any number of suits upon the same cause of action, brought within one year from a judgment of nonsuit, irrespective of the reason or grounds of such judgment, and bases his contention upon the following decisions of this Court: *Meekins v. R. R.,* 131 N. C., 1, 42 S. E., 333; *Prevatt v. Harrelson,* 132 N. C., 250, 43 S. E., 800; *Evans v. Alridge,* 133 N. C., 378, 45 S. E., 772; *Nunnally v. R. R.,* 134 N. C., 755, 46 S. E., 5; *Hood v. Telegraph Co.,* 135 N. C., 622, 47 S. E., 607; *Tussey v. Owen,* 147 N. C., 335, 61 S. E., 180; *Henderson v. Eller,* 147 N. C., 582, 61 S. E., 446; *Lumber Co. v. Harrison,* 148 N. C., 333, 62 S. E., 413; *Starling v. Cotton Mills,* 168 N. C., 229, 84 S. E., 388; *Culbreth v. R. R.,* 169 N. C., 723, 86 S. E., 624.

The principle was thus stated in *Tussey v. Owen, supra:* "The plaintiff may, under the decisions of this Court, bring another action within one year after the judgment of nonsuit. . . . If this were an open question the writer of this opinion would not give his assent to the principle as thus decided, as a dismissal of the case upon the merits,

whether called a nonsuit or by any other name, is equivalent in law to a judgment upon a demurrer to the evidence, which by the best-considered authorities has the same effect as a bar to another suit, as a judgment rendered upon a demurrer to the pleadings or as any other judgment upon the merits. . . . But the law has been settled the other way by actual decision upon the very question, and we now hold unanimously that another suit will lie within a year of the nonsuit."

In *Lumber Co. v. Harrison, supra,* the Court said: "We decided in *Hood v. Telegraph Co.,* 135 N. C., 622, where the same point was presented, that a second action will lie, although nonsuit had been entered against the plaintiff, on the merits, in a former suit for the same cause of action and upon the same state of facts." The decisions cited as a basis for the doctrine announced in the *Hood, Tussey* and *Harrison cases, supra,* are *Meekins v. R. R., supra; Prevatt v. Harrelson, supra; Evans v. Alridge, supra,* and *Nunnally v. R. R., supra.* It may be interesting to observe that the *Meekins case* involved a voluntary nonsuit. The *Prevatt case* contains no reference to a former suit between the parties. In the case of *Evans v. Alridge, supra,* the action was dismissed because of failure of proof of showing the publication of summons. The *Nunnally case, supra,* is a memorandum decision which does not disclose the facts. Apparently, therefore, prior to the *Hood case, supra,* there was no case involving the nonsuit of a prior action upon the merits. The original record in the *Hood case* discloses that there was a trial of the cause upon its merits and the plaintiff was nonsuited. Upon appeal to the Supreme Court the nonsuit was affirmed, 130 N. C., 743, and the petition to rehear filed by plaintiff was dismissed. *Hood v. Tel. Co.,* 131 N. C., 828, 43 S. E., 1003.

So, upon the authorities cited, it is contended that a person may bring a suit, fully develop his case in open court; and, if a judgment of nonsuit is entered, he then, within twelve months, may bring identically the same action, offer identically the same evidence, and if again nonsuited, may continue the same process indefinitely. In other words, if a plaintiff should live as long as Methuselah, he could probably bring five hundred law suits upon the same complaint, offer the same evidence, and yet, there would be no end to the litigation. The same result would follow in the event he appealed to the Supreme Court upon each judgment of nonsuit, and the Supreme Court should affirm the lower court. *Trull v. R. R.,* 151 N. C., 545, 66 S. E., 586.

The defendant, however, contends that a distinction should be drawn between cases nonsuited upon the merits, and after a full hearing, and cases nonsuited for other reasons. In support of this contention the defendant points out that even in *Hood v. Tel. Co.,* 135 N. C., 622, this Court ruled that: "Plaintiff's action was dismissed for lack of sufficient

evidence on a former trial," etc. This statement implies that the case then under consideration was different from the former case. Again in *Culbreth v. R. R.,* this Court said: "But the plaintiff may hereafter show, if she can, that such a claim was filed, as a nonsuit does not prevent the bringing of another action or bar the same, as we held in *Tussey v. Owen.* . . . Unless the plaintiff can supply the deficiency in the present testimony, another suit will not avail her." This language clearly implies that additional evidence would be necessary in the second suit.

Also, in *Smith v. Mfg. Co., supra,* the Court declared that the plaintiff would not be estopped from bringing another suit "for the merits of the case, it appeared, have not been passed upon by any conclusive ruling of the court."

In *Tuttle v. Warren,* 153 N. C., 459, 69 S. E., 426, the Court declared that the plaintiff had "shown no legal right to claim under Reuben Warren, or to avail himself of his possession of the *locus in quo.* . . . In the absence of the essential proof, we must sustain the judgment of nonsuit, but this does not prevent the plaintiff from bringing another action . . . and supplying the present deficiency in the evidence, if he is able to do so." Unquestionably, this declaration of the Court implied that the second case could not be identical with the case then being presently decided.

Again in *Prevatt v. Harrelson, supra,* the Court said: "In refusing the motion to nonsuit there was error for which, under the uniform practice of this Court, there must be a new trial. On such new trial, if the plaintiff can 'mend his lick' by additional and sufficient evidence, well and good. He has not lost the land. If he cannot offer such additional evidence, this, though a new trial in form, will be virtually a finality against him." This declaration also carries upon its face the suggestion that if a new suit is brought and maintained, the "lick must be mended" and additional evidence produced. North Carolina Practice and Procedure, by McIntosh, p. 615.

Furthermore, in *Grimes v. Andrews,* 170 N. C., 516, 87 S. E., 341, it was declared: "We do not say that where it appears that the merits have been considered and passed upon, the judgment of dismissal may not be successfully pleaded as a former adjudication, but no such thing occurred here."

The same suggestion appears in the case of *Northcott v. Northcott,* 175 N. C., 148, 95 S. E., 104.

The quotations from various cases where the question has been considered in this jurisdiction tend to show at least some degree of confusion upon the subject. Certainly, it is apparent that it was present in the minds of the judges writing the opinions that a judgment of nonsuit

upon the merits and after a full hearing, stood upon a different basis from those judgments of nonsuit upon other causes and upon other grounds.

In the last analysis, the philosophy of all procedure is based upon the idea of giving each litigant a full and ample "day in court" upon the merits of his cause, and, when this has been done, he is not entitled to another "day in court" upon identically the same cause of action and upon the identical evidence offered at a former hearing.

The confusion in the law upon the matter now presented can only be eliminated by recognizing a distinction between judgments of nonsuit upon the merits of the entire controversy and after a full hearing in court, and judgments of nonsuit upon other grounds.

Of course a bill of peace might be invoked, if litigation over identically the same cause of action and upon identically the same evidence, should be so long drawn out as to threaten to invade the domain of eternity. But even if the bill of peace should be granted, it would result in a limitation of the application of C. S., 415, as applied in some of the cases referred to—notably *Lumber Co. v. Harrison, supra,* and *Tussey v. Owen, supra.* Certainly, if such limitation can be imposed through enforcing a bill of peace, it would perhaps save time and cost to so construe C. S., 415, in the present case as to produce a uniform rule of procedure upon the question under discussion.

Other states have statutes somewhat similar to C. S., 415, but they vary greatly in their scope. Furthermore, the construction thereof by the courts are not uniform. *Bradshaw v. Bank,* 172 N. C., 632, 37 C. J., 1082.

We therefore hold, upon the particular facts appearing in the judgment in this cause, that a plaintiff may bring an action and have it heard upon its merits, and, if a judgment of nonsuit is then entered, he may bring a new suit within one year, or he may have the cause reviewed by the Supreme Court. If the Supreme Court affirms the judgment of the trial court, he may under C. S., 415, bring a new action within the period therein specified. But, if upon the trial of the new action, upon its merits, in either event, it appears to the trial court, and is found by such court as a fact, that the second suit is based upon substantially identical allegation and substantially identical evidence, and that the merits of the second cause are identically the same, thereupon the trial court should hold that the judgment in the first action was a bar or *res adjudicata,* and thus end that particular litigation.

Affirmed.

THE COMMERCE UNION TRUST COMPANY, MORRIS LIPINSKY, S. WHITLOCK LIPINSKY, AND LOUIS LIPINSKY, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF SOLOMON LIPINSKY, DECEASED, AND MORRIS LIPINSKY, S. WHITLOCK LIPINSKY AND LOUIS LIPINSKY, INDIVIDUALLY, v. CLARA LIPINSKY THORNER.

(Filed 22 January, 1930.)

Wills E h—In this case held: trust estate did not terminate upon death of widow and income payable to her should be reinvested as corpus of the estate.

Where the trustees of a trust estate created by will are directed to invest and reinvest the residue of the estate and hold the same in trust and pay the widow three-fourths of the income and pay one-fourth to the testator's daughter, the trust estate to continue during the life of the widow and for a period of not less than ten years from the date of the testator's death, and then the corpus be distributed to his four children, including the daughter, or their children *per stirpes* in case of death of the testator's children: *Held*, by the express and unambiguous language of the will, the trust estate does not terminate within the ten-year period from testator's death, and where the widow has died during this period, the three-fourths of the income she received under the will, there being no other disposition of such income, should be kept and reinvested by the trustees as an accumulation of the corpus of the trust estate until the specified life of the trust, and then divided in accordance with the distribution specified in the will.

APPEAL from *Finley, J.*, at November Term, 1929, of BUNCOMBE. Reversed.

Controversy without action (C. S., 626). The parties to this controversy submitted to the court for its determination their conflicting contentions, upon a statement of facts agreed, with respect to the disposition by testamentary trustees of the income from a trust fund in their hands.

The trust fund was created by Solomon Lipinsky, deceased, by Item VI of his last will and testament, and is held by the trustees named therein under the provisions of said item. The said item is as follows:

"Item VI. I give, devise and bequeath all the rest, residue and remainder of my property and estate, real, personal and mixed, of whatsoever nature and wherever situate, and whether now owned by me, or hereafter acquired, or to which I may be entitled at the time of my death, unto the Commerce Union Trust Company of Asheville, in the State of North Carolina, and my sons, Morris Lipinsky, S. Whitlock Lipinsky and Louis Lipinsky, or the survivors of them, as trustees, to be held by it and them, in trust, for the uses and purposes hereinafter set forth and declared, that is to say:

(a) The said trustees, or the survivors of them, shall hold, manage and administer said property and estate, collecting the income and profits

thereof for and during the term of the natural life of my beloved wife, Eva Lipinsky, and for a period of not less than ten years after the date of my death, and shall pay over three-fourths of the net income derived therefrom, to my said wife so long as she shall live, and one-fourth to my said daughter, and, upon the death of my said wife, or the expiration of said ten years after the date of my death (if she shall not so long survive me), or as soon thereafter as practicable, the said trustees shall pay over, deliver, transfer and convey all the principal, or corpus, of said trust fund or residuary estate to, and divide the same equally among my four children, Morris Lipinsky, S. Whitlock Lipinsky, Louis Lipinsky and Clara Lipinsky Thorner, share and share alike, thus terminating the trust by this item of my will created; *Provided, however,* if any one or more of said children shall have died leaving lawful issue, or legally adopted child, then the share of such child of mine so dying shall be paid over and delivered to the said Commerce Union Trust Company of Asheville, as trustee, to be held, invested and reinvested by it, the net income thereof to be paid by said trustee to the guardian of such issue until the youngest thereof attains the age of twenty-one years, when the principal of said share, or shares, shall be divided equally between such issue, *per stirpes,* or the heirs of their body, *per stirpes.*

(b) The said trustees, or said Trust Company and a majority of the survivors of the other of said trustees, are authorized to sell and convey, either at public or private sale, and at such prices as they deem best, any real or personal property coming into their hands by virtue of this item of my will, and to reinvest the proceeds thereof, and, from time to time, to change or alter, by exchange or otherwise, any investments of said trust fund, if the interest of said trust fund appears to be benefited thereby; special care, however, shall be taken by said trustees to avoid speculation and to insure safe and profitable investments;

(c) I direct that the said Trust Company shall keep a clear, concise and separate record of the several trusts herein created, and of all the transactions in connection with the said trust funds, which records shall, at all times, be subject to free inspection by the beneficiaries of said trust fund;

(d) I direct that the said trustees, and my executors, hereinafter named, shall receive, as compensation for their services, the usual commissions allowed by law, provided that said Commerce Union Trust Company of Asheville shall receive, for its services full two and one-half per cent (2½%) commission, the balance of the commission, if any, to be divided among the other trustees and executors, as the case may be."

The testator, Solomon Lipinsky, died on 28 March, 1925. His last will and testament was duly probated and recorded in the office of the

clerk of the Superior Court of Buncombe County, North Carolina. His three sons, named in the foregoing item of his said last will and testament as cotrustees with the Commerce Union Trust Company of Asheville, N. C., and also as beneficiaries of the trust, survived him; they are parties, both as trustees and as individuals, to this controversy without action. Mrs. Eva Lipinsky, the wife, and Mrs. Clara Lipinsky Thorner, the daughter, of the testator, also survived him. Mrs. Eva Lipinsky is dead; she died on 7 November, 1928. Mrs. Clara Lipinsky Thorner is now living; she is a party to this controversy without action.

The plaintiffs, the Commerce Union Trust Company of Asheville, N. C., and the three sons of Solomon Lipinsky, deceased, have in hand the fund which they received, and which they hold, as testamentary trustees, under the provisions of said Item VI. This fund has been invested by the said trustees, and has yielded, and continues to yield, an income which the said trustees have collected, and which they will continue to collect, as they are required to do by the provisions of said Item VI.

Three-fourths of the net income from said trust fund collected by the said trustees prior to the death of Mrs. Eva Lipinsky, was paid to her by them, in accordance with the provisions of said Item VI. Since her death, the said trustees have retained in their possession three-fourths of said net income collected by them; they now have in hand, in addition to the principal or corpus of said fund, the sum of $9,000, the said sum being three-fourths of the net income from said fund. The said trustees have refused to pay out this sum to any one.

One-fourth of the net income from said trust fund collected by said trustees, both before and since the death of Mrs. Eva Lipinsky, has been paid to Mrs. Clara Lipinsky Thorner, daughter of Solomon Lipinsky, deceased, by them, in accordance with the provisions of said Item VI.

No part of the net income from said trust fund collected by said trustees since the death of Mrs. Eva Lipinsky, widow of Solomon Lipinsky, has been paid by them to his sons, Morris Lipinsky, S. Whitlock Lipinsky or Louis Lipinsky, beneficiaries of said trust.

This controversy without action involves the disposition by said trustees of the three-fourths of the net income from said trust fund, which has been collected by said trustees since the death of Mrs. Eva Lipinsky, widow of Solomon Lipinsky, or which shall hereafter be collected by them, during the continuance of said trust. The questions submitted to the Court for its decision, as stated by the parties to this controversy without action, are as follows:

"1. Whether or not said three-fourths of said net income shall be allowed to accumulate as a part of the principal of the trust estate, and

at the termination of the trust period of ten years be divided equally among the four beneficiaries of said trust, to wit: Morris Lipinsky, S. Whitlock Lipinsky, Louis Lipinsky, and Clara Lipinsky Thorner"; or

"2. Whether or not said three-fourths of said net income shall now be paid to Morris Lipinsky, S. Whitlock Lipinsky and Louis Lipinsky, and no part thereof to Mrs. Clara Lipinsky Thorner, to whom one-fourth of said income is payable under Item VI."

Morris Lipinsky, S. Whitlock Lipinsky and Louis Lipinsky, as beneficiaries of the trust, contended that upon the death of Mrs. Eva Lipinsky, widow of Solomon Lipinsky, they became and are now entitled to share in the net income from the said trust fund, equally with their sister, Mrs. Clara Lipinsky Thorner, and that the net income which has been collected from said trust fund by the trustees since the death of Mrs. Eva Lipinsky, and the net income from said trust fund which shall be collected by said trustees during the remainder of the trust period of ten years, should be paid by the said trustees to them and to their said sister in equal shares, that is to say, to each one-fourth thereof.

Mrs. Clara Lipinsky Thorner, as a beneficiary of the trust, contended that the three-fourths of the net income from said trust fund, which has been collected by the trustees since the death of Mrs. Eva Lipinsky, and the three-fourths of said net income which shall hereafter be collected by them during the trust period of ten years, should be held by said trustees as a part of the principal of said trust fund, until the termination of the trust at the expiration of ten years from the death of Solomon Lipinsky, and that then, the entire fund in the hands of the said trustees, including the accumulations, should be divided equally among the four children of Solomon Lipinsky, in accordance with the provisions of Item VI, of his last will and testament, or that if the said three-fourths of the said net income is not required to be held until the termination of the trust, but shall be paid out by the trustees now as income, that she should share equally with her brothers in said three-fourths of said income, without accounting for the one-fourth which the trustees are directed to pay to her by the provisions of Item VI.

The court was of opinion that by the provisions of Item VI of the last will and testament of Solomon Lipinsky, the trust thereby created by the testator terminated at the death of Mrs. Eva Lipinsky, and that the principal of the trust fund in the hands of the trustees should have been divided equally among his four children, as beneficiaries of the trust; and that Mrs. Clara Lipinsky Thorner, having received from the trustees one-fourth of the net income from the said principal, collected by the trustees since the termination of the trust, is not entitled to share in the distribution of the sum now in the hands of the trustees, and held

by them as three-fourths of the net income from the trust fund, collected since the death of Mrs. Eva Lipinsky.

From judgment in accordance with the opinion of the court, the Commerce Union Trust Company of Asheville, N. C., one of the trustees, and Clara Lipinsky Thorner, appealed to the Supreme Court.

Alfred S. Barnard for Morris Lipinsky, S. Whitlock Lipinsky and Louis Lipinsky.

Merrimon, Adams & Adams for the Commerce Union Trust Company.

Martin & Martin for Clara Lipinsky Thorner.

CONNOR, J. We do not concur in the opinion of the Superior Court in accordance with which its judgment was rendered, to wit: "That by the terms of the last will and testament of Solomon Lipinsky, deceased, the trust created by Item VI of said will terminated upon the death of Eva Lipinsky, wife of the said Solomon Lipinsky, and that by the terms of said item, the principal or corpus of the residuary estate of the said testator should have been divided at that time, or as soon thereafter as practicable."

It is clear, we think, that it was the intent of the testator, expressed in language which is free from ambiguity, and which therefore does not call for construction (*Wooten v. Hobbs,* 170 N. C., 211, 86 S. E., 811), that the trust created by him in Item VI of his last will and testament, should continue for ten years from the date of his death, at least, and that if his wife survived the expiration of said ten years, that the trust should continue so long as she should live, and in that event should terminate at her death. As she died before the expiration of said period of ten years, the trust continues and does not terminate until the expiration of ten years from the date of the death of the testator.

The parties to this controversy without action do not seem to have had any difference of opinion as to when the trust terminates, under the provisions of Item VI. It seems to be conceded by them that the trust did not terminate at the death of Mrs. Eva Lipinsky, but that it continues until the expiration of ten years from the date of the death of the testator. Whether or not it was error for the court to determine a question not expressly submitted by the parties to the controversy, upon the facts agreed, as contended by the Commerce Union Trust Company of Asheville, we do not now decide or consider. We are of opinion and so hold that there is error in the judgment for that it was rendered in accordance with an erroneous opinion of the court upon the question as to when the trust terminated. For this error, the judgment must be reversed.

We are further of the opinion that in the absence of a direction by the testator as to the distribution of the three-fourths of the net income from the trust fund collected after the death of Mrs. Eva Lipinsky, and before the expiration of the trust, the trustees must hold said three-fourths of said income until the termination of the trust, that is, until the expiration of ten years from the date of the death of the testator. At the termination of the trust, the sum then in the hands of the trustees, representing accumulated income from the trust fund, should be paid by the trustees to the persons who, under the provisions of Item VI, are entitled to share in the principal or corpus of the trust fund.

If the three sons and the daughter of the testator shall be living at the termination of the trust, each will be entitled to an equal share of the fund, including accumulated income. Item VI, however, contains the following provision:

"*Provided, however,* if any one or more of my said children shall have died leaving lawful issue, or legally adopted child, then the share of such child of mine so dying shall be paid over and delivered to the said Commerce Union Trust Company of Asheville, as trustee, etc." The ultimate beneficiaries of the trust created by Item VI of the last will and testament of Solomon Lipinsky cannot be determined until the termination of the trust.

The suggestion of the learned counsel for the appellant, Mrs. Clara Lipinsky Thorner, both in his brief and in his argument in this Court, that the income from the trust fund, after the death of Mrs. Eva Lipinsky, should be paid by the trustees to the children of Solomon Lipinsky, as his distributees, and heirs at law, for the reason that said income is in the nature of undevised property, cannot, we think, be sustained. If the income from the trust fund collected by the trustees after the death of the testator, can be held to be the property of the testator, then the language of Item VI, is broad and comprehensive enough to include such income, and vest it in the trustees, as a part of the residuum of the estate, and therefore as part of the corpus of the trust fund.

In any event, we are of the opinion that the income from the trust fund, collected by the trustees, and retained by them, because the testator has not authorized them to pay it out, until the expiration of the trust, must be held by the trustees and paid by them, at the termination of the trust, to the persons who shall then, under the provisions of Item VI, be entitled to the fund in their hands. To the end that judgment may be entered in the Superior Court of Buncombe County in accordance with this opinion, the judgment rendered must be

Reversed.

IRA FARR v. TALLASSEE POWER COMPANY.

(Filed 22 January, 1930.)

1. Master and Servant C b—In this case held: evidence of master's negligence was sufficient to be submitted to the jury.

Where, in an action by an employee against his employer to recover damages for a negligent injury, the evidence tends to show that the employee was required to hook huge rocks by a cable so that they might be hoisted by a powerful derrick, and that the master, in the exercise of his nondelegable duty to provide a reasonably safe place to work, had placed a watchman on a hill to transmit signals from the employee to the engineer operating the derrick, the employee and the operator of the derrick not being in sight of each other, and that the watchman negligently signalled the operator of the derrick without first receiving his signal from the employee, and that the operator of the derrick started hoisting the rock hooked by the employee before the employee could get safely out of the way, and that he was injured while attempting to run clear of the danger: *Held*, the evidence was sufficient to have been submitted to the jury and to overrule defendant's motion as of nonsuit. C. S., 567.

2. Master and Servant C e—In this case held: the employer could not escape liability on ground that the injury was caused by a fellow-servant.

Where an employer, in the exercise of his nondelegable duty to provide his employee a reasonably safe place to work, places a watchman where he can see both the employees hooking huge rocks by cable to be lifted by a derrick and the operator of the derrick, the operator of the derrick and the employee hooking the rocks not being in sight of each other, the duty of the watchman being to signal the operator of the derrick when the employee was ready for the derrick to hoist a rock he had hooked: *Held*, upon an injury being inflicted upon the employee by reason of the watchman signalling the operator of the derrick before the employee had signalled him that he was ready, the employer may not escape liability on the ground that the watchman was a fellow-servant, and an instruction that under these circumstances the watchman would be a vice-principal is proper.

3. Master and Servant C g—In this case held: act of employee in attempting to avoid imminent peril caused by master's negligence was not contributory negligence barring recovery.

Where an employee engaged in hooking rock with a cable to be hoisted by a derrick is suddenly placed in imminent peril by reason of the employer's vice-principal negligently signalling the engineer operating the derrick to hoist the rock before the employee could get clear of the rock being hoisted: *Held*, the employee's act in running from the danger over slippery rocks, resulting in a fall causing the injury in suit, will not be held as a matter of law to be contributory negligence barring his recovery, and the submission of the question to the jury upon the appropriate issue is proper.

APPEAL by defendant from *McElroy, J.*, and a jury, at June Term, 1929, of GRAHAM. No error.

This is an action for actionable negligence instituted by plaintiff against defendant for injuries sustained.

The defendant is a corporation operating a plant that generates hydro-electric power at Tapoco, N. C. The plaintiff was employed by defendant as a carpenter and pipe-fitter, but in October, 1926, was ordered and directed to assist in removing some large rocks and boulders out of the river near the mouth of the tail race, which was blocking the flow of the water from the water turbine wheels and interfering with the proper operation of them.

The allegations of negligence are:

"(a) The defendant failed to furnish the plaintiff a proper and safe place with proper and safe surroundings and conditions in which to perform the work assigned him to do.

(b) In that the defendant negligently failed to furnish and use proper means, equipment and methods for doing the work in which the plaintiff was ordered and directed to do.

(c) In that the defendant negligently failed to use experienced and competent servants and employees in sufficient number and positions for doing the work properly and safely, in which the plaintiff was assigned and directed to do and in which he was injured.

(d) In that the defendant negligently assigned the plaintiff to work out in the river in a dangerous and unsafe place in connection with high-powered derricks and appliances when in operation and without a proper and safe way or means by which to approach and leave the said derrick cable and its appliances in safety.

(e) In that the defendant wrongfully and negligently started, caused and permitted to be in operation the said powerful derrick and cable at a time when the plaintiff was busily engaged in handling and hooking the end of the cable to a large rock or boulder out in the river in a dangerous and unsafe place, without any notice or warning to the plaintiff.

(f) In that the defendant negligently started its said machine and cable while plaintiff was busily engaged in performing his duty at and in connection therewith to the great danger and distress of plaintiff and caused plaintiff in said emergency to attempt to flee for his safety, throwing him across a rock, rupturing, bruising and permanently injuring his body, causing him to suffer great pain and mental anguish to his great damage."

The defendant denied negligence and set up the defense of contributory negligence, assumption of risk and the fellow-servant doctrine.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff contribute to his injury by his own negligence? Answer: No.

3. Did the plaintiff assume the risk of his injury? Answer: No.

4. What damage, if any, is the plaintiff entitled to recover? Answer: $2,000."

The necessary facts will be set forth in the opinion. The defendant made numerous assignments of error and appealed to the Supreme Court.

T. M. Jenkins, Moody & Moody and Edwards & Leatherwood for plaintiff.

S. W. Black and R. L. Phillips for defendant.

CLARKSON, J. At the close of the plaintiff's evidence and at the close of all the evidence, defendant moved for judgment as in case of nonsuit. C. S., 567. The court below overruled the motions and in this we find no error.

Plaintiff's evidence was to the effect that he was employed by the superintendent in charge of defendant's hydro-electric power plant to assist in removing large rocks out of the river, near the mouth of the tail race. In doing this a derrick and cable were used to lift the rock. A cable was stretched from one side of the mountain to the other, running across the river at the end of the tail race. The engineer in charge of the hoisting engine, W. D. Williams, was not in sight of the man at the tail race, where they hooked or hitched the rock to the cable. The superintendent, Walter Scott, had placed a man, one White, on the side of the mountain who could see the engineer and the workmen at the tail race, and whose duty it was when the rock was hooked at the tail race and the signal given to him to signal the engineer, who would start the engine, and the rock would be hoisted and carried out. When the men hooked on the rock they had to get out of the way. Plaintiff and the men were hitching on the stone 4 x 5 x 7 feet. "We got this rope around this rock and the derrick started, and I did not have time to get across this rough place without rushing for my life, for the only way to get out was the way this cable was coming. Before I could get out the derrick moved and I made a spring to get away from it. I was in the river, over on this side near the power house was water, say 30 or 35 feet, and just back of this rock it seemed to be 4 feet before you could land on another stone, and that water was deep. The only way I could do was to come out the way the cable come, and a little bar of sand

there, and then I got to get out on, and when I stepped on this stone going out from this cable wire was when I got my injury. I was traveling fast because of the danger of this rock, starting before I was ready and could get away. I stepped on a small boulder; it was slick; my left foot slipped from under me and threw me in a twist, and I felt myself tearing in my left side, and of course I felt myself tearing in my left side, and of course I was very bad hurt. If I was doing the hooking on the rock, I was the man to signal Mr. White. I was doing the hooking at the present time, and Mr. White was signalling Mr. Williams to start. Williams was not in sight of me, but I was in sight of White. I did not signal Mr. White to have the engine started. It started without a signal. When I fell White stopped the derrick until I got up out of the way. He flagged him and stopped him. . . . Mr. Walter Scott was in charge of the crew. Mr. Scott was not there, and I suppose they considered that I was in charge. I did not feel that they were altogether under my charge, because he gave me orders and did not say anything to me about it. I had no right to fire or hire them. I could only give them orders that he gave me. . . . Q. Did you tell any one that you wanted another way to get out of there? A. I wanted timbers so we could prepare a gangway, but Scott said there was not any timbers there—no 2 by 4's. Q. Did you look for timber? A. Not any but 6-inch stuff. This was short stuff, and it would take longer boards to get out in safety."

The court below charged the jury: "The court charges you that the defendant contends that White was a fellow-servant of the plaintiff, and if he gave a signal to have the engine started when he had received no such order from the plaintiff, then the defendant contends that the plaintiff was injured by the negligence of White, and that White was his fellow-servant. (The court charges you, however, that if the plaintiff has satisfied you by the greater weight of the evidence that White was stationed at the place designated by Scott, or under Scott's direction, with instructions to receive orders from the plaintiff and transmit them to the engineer to start the machinery, and if the plaintiff has further satisfied you by the greater weight of the evidence that the starting of the machinery and the moving of the cables and stones without orders from the plaintiff rendered the place at which he was required to work much more dangerous, then the court charges you that White could not be a fellow-servant of the plaintiff, but he would be a vice-principal, and the company would be responsible for his acts.)"

The assignment of error is to the part of the charge in parenthesis, and we think this the only material one to be considered on the record.

We think the evidence justified the charge as given. A similar case to the present one is *Cook v. Mfg. Co.*, 182 N. C., 205. There was a

petition in the case to rehear—183 N. C., 48, and at p. 51 we find: "The rigorous rule of the fellow-servant doctrine, as it once obtained, has been greatly modified in recent years. Speaking to this question, *Brown, J.*, in *Tanner v. Lumber Co.*, 140 N. C., 475, makes the following pertinent observation: 'The true rule now is more humane and holds the master liable for negligence in respect to such acts and duties as he is required, or assumed to perform, without regard to the rank or title of the agent entrusted with their performance. As to such acts, the agent occupies the place of the master, and he is liable for the manner in which they are performed. *Flake v. R. R.*, 53 N. Y., 549; *Crispin v. Bobbitt*, 81 N. Y., 521. If the negligent act of one servant is done in the discharge of some positive duty which the master owed to another servant, then negligence in the act upon the part of the servant is the negligence of the master.'"

In *Lucey v. Stack-Gibbs Lumber Co.*, 23 Idaho, 628, 46 L. R. A. (1903), p. 92, *Sullivan, J.*, said: "If it requires warning and signals to protect a servant from injury from falling trees cut by other servants, it is the master's duty to see to it that the proper signals are given, and, if the injury is caused by the failure to give the signals, the master is liable. His ability or responsibility extends beyond the selection of a servant or agent to give the signals, and includes the signal itself, and, if the servant neglects to give it, the master must answer for such negligence, as the authority to a servant to give a signal is nondelegable, and the failure to give it is imputed to the master, and the servant employed to give it is not the fellow-servant of the injured employee so far as the giving or failure to give the signal is concerned. The master cannot instruct a servant to do or perform a nondelegable or nonassignable duty, and escape liability if the servant neglects to perform such duty, in case injury results to the employee." *Riggs v. Mfg. Co.*, 190 N. C., at p. 259.

The superintendent of defendant, Walter Scott, in the exercise of due care to provide a reasonably safe place for plaintiff and the men to work, had placed a watchman, one White, on the side of the mountain for the express purpose of protecting plaintiff and the workmen. This watchman could see both the engineer in charge of the movement of the cable and the men working. Neither the workmen nor the engineer could see each other. When the heavy rock was hitched or hooked to the cable the plaintiff gave the signal to the watchman and in that way the workmen could get out of the way of the rock being dragged and hoisted. In the present case the watchman gave the signal to the engineer without authority from plaintiff, and plaintiff in the emergency in fleeing from danger was injured. It may be inferred from all the facts as disclosed by the record that the work was dangerous and that was the reason the

company placed the watchman to guard the workmen. The court below left this aspect to the jury, and in this we see no error. Under the facts and circumstances of this case, the watchman was an *alter ego.*

In *Odom v. R. R.,* 193 N. C., at p. 444, speaking to the subject in an emergency or imminent peril, it is said: "Nor can it be said, as a matter of law, from the evidence appearing on the present record, that plaintiff's intestate's alleged contributory negligence was such as to bar a recovery. In *Dyer v. Erie Ry. Co.,* 71 N. Y., 228, it was held (as stated in the last head-note): 'The mere fact that a person jumps from a vehicle in which he is traveling, where there is imminent danger of its coming in collision with an approaching train at a crossing, does not bar a recovery against the railroad corporation, although it appears that he made a mistake and would have escaped injury had he remained quiet.' " *Riggs v. Mfg. Co., supra,* at p. 260.

We think the facts in this case distinguishable from *Michaux v. Lassiter,* 188 N. C., 133. In the present case the watchman was a servant or *alter ego* of defendant for a special purpose—to give signals. He was a part of defendant's organization to protect the workmen. Plaintiff had no control over him. He was placed there by defendant, as it were a watchman on the tower to guard the workmen from danger. The false signal he gave was a means by which plaintiff was injured. The court below gave the contentions of the parties, charged the law fully applicable to the facts. The charge covered fully negligence, proximate cause, contributory negligence, assumption of risk, fellow-servant doctrine. We find

No error.

L. F. PHILLIPS AND CLARA I. WELLS, ADMINISTRATRIX OF E. G. WELLS, DECEASED, v. SADIE A. KERR AND J. L. KERR, HER HUSBAND.

(Filed 22 January, 1930.)

1. **Taxation H b—Listing of property for taxation according to statute is prerequisite to validity of tax deed.**

   It is required to a valid sheriff's deed under a sale of land for taxes that the property shall have been listed for taxation according to the statute applicable at the time thereof.

2. **Same—Tax list-taker does not have authority to list property for owner and sign his name thereto.**

   Under a statute providing that the owner shall list his land for taxes under oath, or, in certain cases by an agent, or upon his failure therein the chairman of the board of commissioners shall list the description and valuation of the property, no authority is given the list-taker of the town-

ship to act for the owner, and in such instance the sheriff's deed to the lands to the purchaser at a tax sale does not pass title as against the owner or those claiming under him, and this result is not varied by C. S., 7925, making it the duty of the list-taker to be constantly on the lookout for unlisted property, the authority to list the property so found being confined to the chairman of the board of commissioners alone.

3. Same—Tax deed is only presumptive proof that the property had been properly listed for taxes.

A sheriff's deed for the sale of lands for taxes is but presumptive proof that the property had been listed for taxes as the statute requires, and may be rebutted. C. S., 8034.

4. Taxation H c—C. S., 8034 does not apply where tax deed is void because property had not been listed for taxes.

C. S., 8034, providing that no person shall be permitted to question the title to lands acquired under a sheriff's deed without first showing that he or the person under whom he claims had title to the property at the time of the sale does not apply when the sheriff's deed is void for the failure of the listing of the property as required by statute.

APPEAL by defendants from *Midyette, J.*, at August Term, 1929, of BLADEN. No error.

Action to recover land claimed by the *feme* defendant under a purported sale for the nonpayment of taxes. In 1923 W. T. Wallace owned the land, described as lots 16 and 18 of the B. L. Herring subdivision, but he did not list it that year for taxes. The list-taker for the township listed it in the name of W. T. Wallace, signed the owner's name, and returned the tax scroll for 1923 with the following entry: "W. T. Wallace, Wallace, N. C. Two lots, White Lake, $600. Signed W. T. Wallace." This was done without the owner's permission, consent or knowledge. Wallace did not pay the taxes for 1923, and on 5 May, 1924, the sheriff sold the lots for the unpaid taxes. On 19 May, 1925, he executed a deed to the county of Bladen for "two lots, Nos. 16 and 18 of the B. L. Herring subdivision, lying and being in Colly Township, listed in the name of W. T. Wallace for taxation for the year 1923." On 11 June, 1925, the county of Bladen executed a deed for the lots under the same description to the *feme* defendant, and this deed was registered on 2 July, 1925. W. T. Wallace and wife conveyed the lots to E. G. Wells, and Wells and wife thereafter conveyed them to the plaintiff Phillips, who secured the purchase price of $300 by a note and mortgage on the property.

In reference to the issue—"Is the plaintiff L. F. Phillips the owner in fee of the lands described in the complaint?"—his Honor directed an affirmative finding if the jury should find the facts to be as testified by the witnesses. The verdict was against the defendants and to the judgment given thereon they excepted and appealed.

George R. Ward for plaintiffs.
Richard L. Herring for defendants.

ADAMS, J. In 1923 W. T. Wallace had title to the land in suit, but he neither listed it for taxation nor authorized any one to list it for him. The township list-taker entered the property upon the tax sheet in the name of W. T. Wallace without the latter's direction, knowledge or consent; signed Wallace's name, and made a return of the tax sheet as if the property had been listed by the owner. The plaintiffs contend that the list-taker acted in this particular without authority of law, that in legal contemplation the property was not listed for taxation; that the sale for the nonpayment of taxes was void, and that the sheriff's deed conveyed no title. To support this position they rely upon *Rexford v. Phillips,* 159 N. C., 213, and subsequent cases in which it is cited and approved. In that case it was held that under the statute authorizing the sale of land for taxes it was necessary to show that the land had been listed for taxes in the manner prescribed by law; that there was no provision in the law for the listing of land by a township list-taker, and that the purported listing there attacked was void. The Court adhered to this principle in *Stone v. Phillips,* 176 N. C., 457, 460: "We consider it not improper to state further that we have held in *Rexford v. Phillips,* 159 N. C., 213, that land is not properly listed for taxation, rendering it subject to sale, unless it has been done according to the provisions of law—that is, by the owner or by his duly accredited agent in cases where listing by an agent is permissible. Revisal, secs. 5217-5218. And where neither has acted, the chairman of the board of county commissioners is authorized to list the same under section 5233, etc." The last two cases are approved in *Headman v. Commissioners,* 177 N. C., 261, in which the Court points out the distinction between a failure to list property for taxes and a mere listing in the wrong name when the property is sufficiently described. *Rexford's case* was again sustained in *Cherokee County v. McClelland,* 179 N. C., 127. *Justice Hoke* there said: "In *Rexford v. Phillips,* 159 N. C., 213, the tax deed was avoided because the land had never been put on the tax list by any one having proper authority for the purpose."

These cases are controlling unless there has been a material change in the statutes prescribing the method of listing property for taxation. As we construe the statutes, no radical change has been made affecting the point under discussion.

The question is to be determined by the law which was in force in 1923 and 1924. Public Laws 1923, ch. 12. This act contains the sections upon which rests the decision in *Rexford v. Phillips, supra.* Sections 5217, 5222, 5227 of the Revisal, cited in the opinion, are brought

forward in the act of 1923 as sections 23, 30, 27. They provide that the owner in person shall make a return of his property under oath, or in certain cases by an agent. Revisal 5218, act 1923, sec. 24. If the owner fails to make such return the chairman of the board of commissioners shall list the description and valuation of the property not given in for taxation. Revisal, 5233, act 1923, sec. 75. And if such property is omitted from the list the board of commissioners by the chairman shall add to the simple taxes of the current year all taxes due for preceding years with 25 per centum in addition to the tax with which the owner would otherwise be chargeable. Revisal 5232, act 1923, sec. 75.

The defendants say, however, that the list-taker has authority to list the property of a delinquent owner by virtue of the act of 1917. Public Laws 1917, ch. 234, sec. 25, act 1923, sec. 25, C. S., 7925. This statute makes it the duty of the county commissioners and the several list-takers "to be constantly looking out for property which has not been listed for taxation." Such property when discovered shall be duly placed upon the assessment list and properly assessed for taxation. By whom? By the chairman of the board of commissioners. He alone is charged with the duty of entering upon the tax list property not given in by the owner or his agent. Act 1923, sec. 75; *Rexford v. Phillips, supra.* He must not only list the property; he must impose the prescribed penalty. To this end the list-taker should upon discovery return to the commissioners any property not listed for taxation. Whether his discovery is before or after the tax list has been turned over to the sheriff he must return the unlisted property to the clerk of the board of commissioners. Sec. 75. The unavoidable conclusion, we think, is this: that the lots in controversy had not been legally listed when the purported sale was made, and that the sheriff's deed conveyed no title.

A tax deed, it is true, is conclusive proof that the manner of listing the property complied with the law, but it is only presumptive proof that the property had been listed. C. S., 8034. Here the undisputed evidence rebuts the presumption. The question was considered in *Rexford v. Phillips, supra,* and decided adversely to the defendant's contention. Revisal, 2909.

The defendants finally turn to the following clause in section 8034: "No person shall be permitted to question the title acquired by a sheriff's deed made pursuant to this chapter without first showing that he or the person under whom he claims title had title to the property at the time of the sale, and that all taxes due upon the property have been paid by such person or the persons under whom he claims title."

The party under whom the plaintiff claims had title when the sale was made, and the plaintiff was not required to show that he had paid all the taxes due at the time of the sale. The *feme* defendant's deed

was not made pursuant to or in conformity with the statutes applicable, and in such case the paragraph above quoted does not apply. It applies, not when the deed is void, but when the conveyance passes the title. The provision in reference to the authoritative listing of property is a basic requirement of the law. This conclusion is reached and upheld in *Rexford v. Phillips, supra,* and in *Price v. Slagle,* 189 N. C., 757. We find

No error.

OTIS GREEN v. BERNARD ELIAS.

(Filed 22 January, 1930.)

1. Mortgages H m—Purchaser at foreclosure sale does not assume personal liability on prior encumbrances, but may not attack their validity.

Where the purchaser of lands at a foreclosure sale of a deed of trust takes title subject to registered encumbrances prior to the deed of trust foreclosed, he does not thereby assume personal liability for the prior encumbrances, but takes title subject thereto, but he may not contest the validity of the prior encumbrances nor the amount secured thereby.

2. Mortgages H k—Where mortgagee bids in property at foreclosure sale of purchase money mortgage he may recover deficiency from mortgagor.

Where the grantor of lands takes a deed of trust from the grantee to secure the balance of the purchase price, and the deed of trust is foreclosed and the grantor bids in the property at the foreclosure sale for an amount less than the full amount secured by his deed of trust, in his suit against the grantee to recover the deficiency a judgment in his favor for the amount secured by his deed of trust and the costs of foreclosure less the amount paid by him at the foreclosure sale is proper.

3. Mortgages F b—Where purchaser of equity of redemption assumes prior encumbrances his grantor may recover sums paid in discharge thereof.

Where the owner of lands sells to another by deed in which, as a part of the purchase price, the grantee expressly assumes prior encumbrances on the land, and in payment of the balance of the purchase price pays the grantor a sum of money and executes a deed of trust securing notes for the remainder, and upon the grantee's default in the payment of some of the notes secured by the prior encumbrances, the grantor pays them, and later his deed of trust is foreclosed: *Held,* as between the grantor and the grantee the relation of principal and surety existed as to the prior encumbrances, and the grantor may recover against the grantee the sums paid by him in discharge thereof, and where the grantor has bought in the property at the foreclosure of his own deed of trust and accepts the deed of the trustee made subject to prior encumbrances, the grantee may not set up as a counterclaim or set-off in the grantor's action to recover the deficiency the amount he has paid on the notes secured by the prior encumbrances.

GREEN *v.* ELIAS.

APPEAL by defendant from *Johnston, Special Judge,* at July Term, 1929, of BUNCOMBE. Affirmed.

From judgment on facts agreed that plaintiff recover of defendant (1) the sum of $7,751.05, with interest thereon from 18 August, 1928; (2) the sum of $3,000, with interest thereon from 1 January, 1928; and (3) the sum of $2,416, with interest thereon from 29 March, 1928, together with the costs of the action, defendant appealed to the Supreme Court.

Clinton W. Hughes for plaintiff.
Bernard, Williams & Wright for defendant.

CONNOR, J. On 11 February, 1926, plaintiff conveyed to defendant certain land situate in Buncombe County, N. C. The purchase price for said land was paid to plaintiff by defendant, partly in cash, partly in notes executed by defendant, payable to plaintiff, and partly by defendant's agreement with plaintiff to assume and pay certain notes on which plaintiff was liable, the said notes being secured by deeds of trust on said land, which had been duly registered prior to the conveyance of the land by plaintiff to defendant.

Defendant paid to plaintiff, at the date of the conveyance of the land to him by plaintiff, in cash, the sum of $10,312.50; he executed and delivered to plaintiff his three notes, each for the sum of $3,895.83, all bearing interest from date. These notes, aggregating the sum of $11,687.49, were secured by a deed of trust on the land, executed by defendant. Defendant thus paid to plaintiff on the purchase price for said land the sum of $22,000.

Plaintiff had purchased said land from Zeb V. Nettles and R. C. Scruggs, who conveyed the same to plaintiff on 1 January, 1926. In part payment of the purchase price for said land plaintiff had executed and delivered to the said Zeb V. Nettles and R. C. Scruggs his six notes, each for the sum of $1,208, all bearing interest from date. These notes were secured by a deed of trust on said land, executed by plaintiff. Upon the conveyance of the land to him by the plaintiff, defendant expressly assumed the payment of these notes, aggregating the sum of $7,250, in part payment of the purchase price for said land.

Prior to the conveyance of said land to plaintiff, the said Zeb V. Nettles and R. C. Scruggs had executed a deed of trust on said land to secure the payment of four notes, each for the sum of $3,000 executed by them and payable to E. C. Carrier. In part payment of the purchase price for said land to the said Zeb V. Nettles and R. C. Scruggs, plaintiff had assumed the payment of their said notes, aggregating the sum of $12,000. Upon the conveyance of the land to him by the plaintiff,

defendant expressly assumed the payment of these notes, in part payment of the purchase price for said land.

The notes secured by prior deeds of trust on said land, for which plaintiff was liable, as maker or by reason of his agreement with his grantors, and which defendant assumed in part payment of the purchase price for the land conveyed to him by plaintiff, amounted to the sum of $19,250. The total purchase price for said land, which defendant paid or agreed to pay to plaintiff was $41,250.

After plaintiff conveyed the land to defendant, defendant paid one of the notes, payable to E. C. Carrier, and two of the notes, payable to Zeb V. Nettles and R. C. Scruggs, in accordance with his agreement with plaintiff. The total amount paid by defendant in discharge of his liability on said notes, by reason of his agreement with plaintiff was $5,416, and accrued interest. Defendant has failed to pay the remainder of said notes.

Upon defendant's default in his agreement with plaintiff, to pay the same, plaintiff, by reason of his liability thereon, paid one of the notes payable to E. C. Carrier, and two of the notes payable to Zeb V. Nettles and R. C. Scruggs. The total amount paid by plaintiff, for which defendant was liable by reason of his agreement with plaintiff, was $5,416, and accrued interest.

Upon default by defendant in the payment of the notes executed by him, payable to plaintiff, the deed of trust securing said notes was foreclosed by the sale of the land conveyed thereby on 7 August, 1928. The land was offered for sale by the trustee "subject to prior mortgages, liens and encumbrances, amounting to $21,725.36, taxes and street assessments." Plaintiff bid for the land, as offered by the trustee, the sum of $5,000. This bid was duly reported by the trustee to the clerk of the Superior Court of Buncombe County. The bid was accepted and the sale in accordance therewith was duly confirmed. Pursuant to the order of confirmation, the land was conveyed by the trustee to plaintiff, upon his payment of the amount of his bid, to wit, $5,000, "subject to prior mortgages, liens and encumbrances, amounting to $21,725.36, taxes and street assessments." The sum of $5,000 paid by plaintiff, in accordance with his bid, was applied as a payment on the notes executed by defendant, payable to plaintiff, and secured by the deed of trust, under which the land was sold, leaving a balance due on said notes of $7,751.05, with interest thereon from 18 August, 1928.

The total amount of the notes secured by deeds of trust, which were prior to the deed of trust under which the land was sold, with interest accrued to the date of the sale, was $21,725.36. This amount includes the notes which had been paid prior to the sale by plaintiff, to wit, a note for $3,000, payable to E. C. Carrier, and two notes, each for

$1,208, payable to Zeb V. Nettles and R. C. Scruggs. It also includes the notes paid by defendant in like amounts.

Plaintiff, by his acceptance of the deed of the trustee, conveying the land to him, "subject to prior mortgages, liens and encumbrances, amounting to $21,725.36, taxes and street assessments," did not assume or become personally liable for the said sum. *Harvey v. Knitting Mills,* 197 N. C., 177. His title to said land, however, is subject to the deeds of trust which are prior in registration to his deed from the trustee; until the amount secured by said deeds of trust has been paid, the plaintiff holds his title to the land subject to the amount secured by said deeds of trust. This amount was fixed and made certain by the terms on which the land was sold by the trustee and purchased by plaintiff. Plaintiff cannot contest the validity of the deeds of trust, nor the amount secured thereby. This action, however, has been brought by the plaintiff, not as the purchaser of the land, but as a creditor of defendant.

Upon the facts agreed, there was no error in the judgment that plaintiff recover of the defendant the sum of $7,751.05, with interest, this sum being the balance due on the notes executed by defendant and payable to plaintiff.

Nor was there error in the judgment that plaintiff recover of defendant the sum of $3,000, with interest, and the further sum of $2,416, with interest. These sums were paid by plaintiff, as surety for defendant, and only after defendant had defaulted in his agreement with plaintiff to pay the same. With respect to the notes for which these sums were paid, as between themselves, defendant was liable as principal, and plaintiff as surety. *Keller v. Parish,* 196 N. C., 733, 147 S. E., 9; *Rector v. Lyda,* 180 N. C., 577, 105 S. E., 170; *Baber v. Hanie,* 163 N. C., 588, 80 S. E., 57.

Defendant is not entitled to set up as a counterclaim or set off to the amounts which plaintiff is entitled to recover of him, the amounts paid by defendant in discharge of his liability on notes, which under his agreement with plaintiff he had assumed. Whether or not upon the facts agreed in this case, defendant has an equity to have the land sold for the payment of the entire amount of the notes secured by the deeds of trust, which are prior liens or encumbrances on the land purchased and now owned by plaintiff subject to such amount, if defendant shall be required by plaintiff to pay said amount, or any part thereof, by reason of his assumption of the notes secured by said deeds of trust, is a question not now presented for decision. Upon this question we express no opinion. The judgment in this action, which must be affirmed, will not prejudice defendant if he shall hereafter present this question for decision. The judgment is

Affirmed.

STATE v. CLEM WRENN, W. H. FOSTER AND C. C. FAW.

(Filed 22 January, 1930.)

1. Conspiracy A a—Elements of conspiracy.

In order to constitute a conspiracy it is required that two or more persons agree together and form the intent to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means, and neither the consummation of the intent nor any overt act in furtherance of the conspiracy is necessary, and while the criminal character of a combination or agreement may be inferred from facts and circumstances, such facts and circumstances must point unerringly to that end.

2. Same—In this case held: evidence of defendant's guilt of entering into a conspiracy was insufficient.

Where, in a prosecution for criminal conspiracy the evidence is that one of the defendants was the president of a bank negotiating notes for the county board of education and the county board of road commissioners, and that he was also president of a certain construction company, and that the second defendant was a stockholder in the construction company, and was also county superintendent of roads, and that the third defendant was the chairman of the board of education, and that the first defendant, regarded as a man of high character, procured from the other defendants notes of the board of education and of the board of road commissioners to be used to renew outstanding notes of these bodies and raised them and used the funds in his bank and for the construction company without the knowledge or consent of the codefendants who received no benefit: *Held*, the evidence is insufficient to convict the latter named codefendants of criminal conspiracy, and their motions as of nonsuit should have been allowed. C. S., 4643.

APPEAL by defendants, W. H. Foster and C. C. Faw, from *Barnhill, J.*, at Special Criminal Term, September, 1928, of WILKES.

Criminal prosecution tried upon an indictment charging Clem Wrenn, W. H. Foster and C. C. Faw with conspiracy, in that it is alleged they unlawfully and feloniously agreed, conspired and confederated among themselves to cheat and defraud Wilkes County, the Bank of Wilkes, and certain New York banks out of large sums of money, "contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State."

In support of the indictment, the evidence offered by the State tends to show that, during the years 1925, 1926 and 1927, Clem Wrenn was president of the Bank of Wilkes and also president of the Foster Construction Company, a corporation engaged in road construction work, with a bank account in the Bank of Wilkes; that W. H. Foster was interested in the Foster Construction Company, as stockholder, and was its nominal secretary and treasurer; he was also superintendent of roads of Wilkes County; that C. C. Faw was chairman of the board of educa-

tion of Wilkes County, and that a part of the funds obtained on spurious notes of the board of education were placed to the credit of the Foster Construction Company in the Bank of Wilkes and used by said company.

The principal transactions were as follows:

1. During 1926 and 1927 the board of education of Wilkes County had two valid notes outstanding, one in the sum of $10,000 and the other in the sum of $25,000, both of which had been negotiated through the Bank of Wilkes and were held by banks or bankers in the city of New York. Shortly before their maturity Wrenn, president of the Bank of Wilkes, told Faw, chairman of the board of education, that renewal notes ought to be sent to New York in time to meet said maturing notes. Faw, thereupon, called the secretary of the board, C. C. Wright, over the telephone and obtained authority to sign his name to both renewal notes. Wrenn later suggested that if the renewal notes were made out in smaller denominations perhaps a better rate of interest might be obtained. Whereupon, seven notes of $5,000 each were executed by Faw (Wright's name being signed by Faw on the authority previously given over the telephone) and delivered to Wrenn, who was to complete their execution by obtaining the signature of the county attorney and have him affix the seal of the board of education. Wrenn took the notes to the office of the county attorney and, finding him out, affixed the seal to the notes himself, had another attorney certify to their legality, and then raised said notes from $5,000 to $25,000 each. From time to time Wrenn negotiated one or more of these notes in New York, dating them apparently to suit his convenience or necessity, and placed $41,000 of the proceeds to the credit of the Foster Construction Company, and the balance over the amount for which the board of education was legally liable seems to have been used by Wrenn for his own purposes or for the Bank of Wilkes.

2. In February, 1927, the board of commissioners of Wilkes County had a $6,000 note falling due in New York, which said note was duly issued for road work in the county. To take up this note the board of commissioners executed a renewal note, in a like sum, and turned it over to Wrenn, president of the Bank of Wilkes, to be used by him in caring for the road note soon to mature. Wrenn informed Foster, superintendent of roads, that in some way this renewal note had become blurred or splotched, and that the New York bankers would not accept it. Whereupon, as the matter was urgent, he insisted that Foster see the chairman of the board of commissioners and have another note executed to take the place of the blurred or splotched one. This was done, the chairman executing a blank note, which Wrenn filled out for $25,000 instead of $6,000, and had the county seal placed on it. A few

days thereafter the chairman of the board of commissioners spoke to Wrenn about the matter, and was informed by him that the New York bankers had subsequently reconsidered their objection to the alleged blurred or splotched note, accepted it, and that he, Wrenn, had destroyed the note executed to take its place, which representation seems to have been false, as Wrenn wrongfully negotiated said note for other purposes.

It is not contended that Faw had anything to do with any of the road notes.

Wrenn testified that he alone was responsible for altering and raising the notes in question, and that neither Faw nor Foster had anything to do with any of the illegal transactions appearing of record. Faw and Foster also testified that they knew nothing of Wrenn's unlawful schemes. Wrenn is now, and was at the time of trial, serving a term in the State's prison for fraudulently issuing these six notes of $25,000 each and embezzling the proceeds, to which he pleaded guilty. He does not appeal, as prayer for judgment in the present case was continued as to him.

Prior to the failure of the Bank of Wilkes in May, 1927, Wrenn was regarded by his friends and associates as a man of integrity and honor; he had the entire respect and goodwill of the community; no one suspected his wrongdoing, and Faw and Foster both placed confidence in his word, as did the local business people.

From an adverse verdict and judgment against W. H. Foster and C. C. Faw that each be confined in the State's prison for a term of not less than four nor more than seven years, the said defendants appeal, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Charles G. Gilreath, J. H. Burke and Manning & Manning for defendants Faw and Foster.

STACY, C. J., after stating the case: It is not seriously contended that all three of the defendants participated in any one of the transactions appearing of record. The dealings in connection with the school notes relate only to Wrenn and Faw, while those touching the road notes involve only Wrenn and Foster. And we have discovered no evidence of sufficient probative value to establish a conspiracy between any two of the defendants.

The gist of a conspiracy has been described as an unlawful concurrence of two or more persons in a wicked scheme—a combination to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful

means—and it is said that no overt act on the part of any of the conspirators is necessary to complete the crime, but the intent to accomplish some crime or unlawful purpose, or to bring about some end, not in itself criminal or unlawful, by criminal or unlawful means, is a necessary element of the offense. *S. v. Ritter,* 197 N. C., 113, 147 S. E., 733; *S. v. Martin,* 191 N. C., 404, 132 S. E., 16; *S. v. Dalton,* 168 N. C., 204, 83 S. E., 693; *S. v. Van Pelt,* 136 N. C., 633, 49 S. E., 177; *S. v. Trammell,* 24 N. C., 379; 5 R. C. L., 1060. "If two or more persons conspire to do a wrong, this conspiracy is an act 'rendering the transaction a crime,' without any step taken in pursuance of the conspiracy." *S. v. Brady,* 107 N. C., 822, 12 S. E., 325. The *conspiracy* is the crime, and not its execution. *S. v. Younger,* 12 N. C., 357; 5 R. C. L., 1066. It requires the confederation of at least two, as one person cannot conspire alone, and of course it may include more. *S. v. Diggs,* 181 N. C., 550, 106 S. E., 834; *S. v. Christianbury,* 44 N. C., 46; 5 R. C. L., 1078.

It is true, of course, that the criminal character of a combination, agreement or confederacy may be inferred from facts and circumstances, where they point unerringly to that end, but here the situation of the parties seems to repel any idea of a conspiracy, certainly as between Wrenn and Faw, and while there may be more reason for inferring a combination between Wrenn and Foster, we have concluded that the evidence is not sufficient to establish this either. Faw had profited nothing by the machinations of Wrenn, nor does it appear that Foster did so knowingly, or that he was "consenting unto the wrong." So far as the record discloses, both Faw and Foster seem to have been no more than victims of misplaced confidence. This is not enough to hold them for a conspiracy.

It follows, therefore, that the motion of the appealing defendants for judgment as in case of nonsuit should have been allowed. The motion will be sustained here as provided by C. S., 4643.

Reversed.

CLARA F. JUSTICE v. TENCH C. COXE, JR.

(Filed 22 January, 1930.)

1. Evidence J a—Parol evidence as to payment of note held admissible.

Where the purchase-money note secured by mortgage is given for the balance of the purchase price of lands it may be shown by parol evidence that it was contemporaneously agreed between the parties that the maker of the note was to be discharged upon his conveyance of the lands to another who was to pay the consideration and who were the real parties

to the contract and for whom the maker of the note was acting, the parol evidence not tending to vary the terms of the written instrument, but being solely as to the method of payment contemplated by the parties.

2. Mortgages C d—Under agreement of parties in this case mortgagor was not liable for mortgage debt.

One to whom title to lands is conveyed upon payment of part of the purchase price with money furnished by another, and who gives his note secured by a mortgage to the grantor for the balance, and who receives no benefit from the transaction, under an agreement that the mortgagor was to be discharged from liability upon his conveyance to the one furnishing a part of the purchase price: *Held*, the mortgagor acquires only the naked title in trust which he may be compelled to convey to the real beneficial party upon his assumption of the mortgage debt, and upon his transfer of the property to him is not liable to the mortgagee thereon.

APPEAL by plaintiff from *Schenck, J.*, at April Term, 1929, of BUNCOMBE. No error.

Action to recover the balance due on notes executed by defendant, and payable to plaintiff or her order.

The consideration for said notes, as alleged in the complaint, was part of the purchase price for land conveyed to defendant by plaintiff, the remainder of said purchase price having been paid to plaintiff, at the date of the conveyance by her of said land. The notes were secured by a deed of trust on said land; this deed of trust was also executed by defendant. Upon default in the payment of said notes, the deed of trust was foreclosed by the sale of the land conveyed thereby. The net proceeds of said sale were applied as payments on said notes, leaving a balance due thereon of $3,223.35. Plaintiff prays judgment that she recover of the defendant the said sum of $3,223.35, with interest and costs.

In his answer defendant admitted the execution by him of the notes sued on; he alleges, however, that he received no consideration for said notes, for that, pursuant to the terms of an agreement made by and between plaintiff and defendant, contemporaneously with the conveyance of the land to him by the plaintiff, and with the execution of said notes by him, he subsequently conveyed the land which plaintiff had conveyed to him to George W. Knight, Edward Higgins and Samuel Puleston, who assumed the payment of said notes in accordance with the terms of said agreement. Defendant contends that having performed his agreement with plaintiff, by its terms he was discharged of liability to plaintiff on said notes. He prays judgment that plaintiff take nothing by her action, and that he go hence without day and recover his costs of the plaintiff.

At the trial defendant offered evidence tending to sustain the allegations of his answer.

There was evidence tending to show that the land was conveyed by plaintiff to defendant, and that the notes sued on were executed by defendant, solely for the benefit and accommodation of plaintiff; that she had theretofore contracted in writing to sell and convey the said land to George W. Knight, Edward Higgins and Samuel Puleston, residents of the State of Florida; that because of their absence from this State on the day when she insisted upon performing her contract with them, they could not on said day execute the notes and deed of trust securing the same, in accordance with said contract; and that in order to enable plaintiff to secure the cash payment on the purchase price of said land, on said day, it was agreed by and between plaintiff and defendant, with the approval of said George W. Knight, Edward Higgins and Samuel Puleston, given to their attorneys over the telephone, that plaintiff should convey the land to defendant, and that defendant should execute the notes for the deferred payments on the purchase price, and the deed of trust securing said notes, and should thereafter, as soon as practicable, convey the land to the said George W. Knight, Edward Higgins and Samuel Puleston, who should thereupon assume the payment of the notes. This agreement was fully performed by all the parties thereto. As the result of the manner in which the transaction was handled, plaintiff received the cash payment on the purchase price for her land, the same having been made by their attorneys in this State from funds furnished by George W. Knight, Edward Higgins and Samuel Puleston for that purpose.

The only issue submitted to the jury was answered as follows: "Was there a contract, express or implied, between the plaintiff, Clara F. Justice, and the defendant, Tench C. Coxe, Jr., that the notes sued on were to be paid by George W. Knight, Edward Higgins, and Samuel Puleston, as alleged in the answer? Answer: Yes."

From judgment on the verdict that plaintiff take nothing by her action, and that defendant go without day and recover of plaintiff his costs, plaintiff appealed to the Supreme Court.

Rollins & Smathers for plaintiff.
Carter & Carter and Joseph F. Ford for defendant.

CONNOR, J. Parol evidence offered by defendant for the purpose of showing all the terms of the contract between plaintiff and defendant, with respect to the transaction of which the execution of the notes was only a part, was admissible and competent for that purpose. *Crown Co. v. Jones,* 196 N. C., 208, 145 S. E., 5. The agreement shown by the evidence does not contradict, add to, alter or vary the terms of the notes.

Plaintiff's objections to the admission of the evidence were properly overruled. On her appeal to this Court plaintiff relies solely upon assignments of error presenting her contention that the parol evidence was inadmissible and should have been excluded, for that it tended to contradict, add to, alter or vary the terms of the notes. These assignments of error cannot be sustained.

All the evidence was to the effect that defendant did not receive, and that it was not contemplated by the parties to the contract, pursuant to which the notes were executed, that he should receive any consideration for said notes. He acquired no beneficial interest in the land conveyed to him by the plaintiff. He paid no part of the cash payment on the purchase price for said land; the cash payment was made to the plaintiff by George W. Knight, Edward Higgins and Samuel Puleston, in accordance with their contract with her. Upon the consummation of the transaction, involving the conveyance of the land by plaintiff to defendant, the said George W. Knight, Edward Higgins and Samuel Puleston became the equitable owners of the land, and upon their assumption of the notes executed by defendant, would have been entitled to a decree that defendant convey the legal title to them. Defendant under his deed from the plaintiff, by reason of the agreement between him and the plaintiff, acquired the bare legal title to the land, which in accordance with his agreement with plaintiff and with them, he conveyed to George W. Knight, Edward Higgins and Samuel Puleston, upon their assumption of the notes for the balance due on the purchase price for the land.

Even if it should be held that prior to his conveyance of the land in accordance with his agreement, defendant was liable on the notes to plaintiff, upon such conveyance, in performance of his agreement, he was discharged of such liability. It would be unconscionable to hold otherwise. The law will not permit plaintiff to require defendant to agree to convey the land to a third party, and then after defendant has complied with this agreement, to hold defendant liable on the notes which in accordance with the agreement, he has required such party to assume.

The contract, which defendant alleged in his answer was entered into by and between him and the plaintiff contemporaneously with the execution of the notes, was, in effect, that defendant should be discharged of liability upon his conveyance of the land to George W. Knight, Edward Higgins and Samuel Puleston, and upon their assumption of the notes. Parol evidence to show this contract was admissible upon the principle on which *Bank v. Winslow,* 193 N. C., 470, 137 S. E., 320, was decided. In the opinion in that case it is said, "The law is firmly established that parol evidence is inadmissible to contradict or vary the terms of a nego-

tiable instrument, but this rule does not apply to a parol agreement made contemporaneously with the writing providing a mode of payment." Nor does the rule apply to such parol agreement providing for discharge of the maker otherwise than by payment. The judgment is affirmed. We find

No error.

MELVIN GIBSON, BY HIS NEXT FRIEND, T. C. BLACK, v. LEAKSVILLE COTTON MILLS.

(Filed 22 January, 1930.)

Master and Servant C d—In this case held: question of whether master's failure to warn servant was negligence was for jury.

Evidence that the defendant's fourteen-year-old uninstructed employee was injured while at work on a folding machine by the knife thereof as it passed across the machine cutting off his finger, that the fact as to how the machine operated was apparent and known to him, but that he was not instructed or warned of the danger incident thereto raises an issue as to the defendant's actionable negligence to be determined by the jury, and defendant's motion as of nonsuit thereon should have been denied. C. S., 567.

APPEAL from *Moore, J.*, at June Term, 1929, of ROCKINGHAM. Reversed.

This is an action for actionable negligence, brought by Melvin Gibson, by his next friend, T. C. Black, against Leaksville Cotton Mills, for injuries sustained.

The plaintiff, Melvin Gibson, by his next friend, T. C. Black, contends that he had been working for defendant about three months in its cotton mill at Spray, N. C., when he was injured, and had not had any experience in working around mills and machinery when he started work. On 15 November, 1927, while helping to operate a folding machine, while in the scope of his employment, his left forefinger was cut off and he was otherwise injured. That he at the time was fourteen years old and was inexperienced and was not warned of the danger incident to the work. That there was a folding blade, or knife, which plays back and forth for the purpose of folding the cloth; that in straightening the cloth the blade cut off his finger. The defendant denied any negligence, and set up the plea of contributory negligence. The material facts will be set forth in the opinion.

Glidewell, Dunn and Gwyn, by Allen H. Gwyn for plaintiff.
King, Sapp & King for defendant.

PER CURIAM. The defendant introduced no evidence, and at the close of plaintiff's evidence made a motion for judgment as in case of nonsuit. C. S., 567. The motion was granted and plaintiff excepted, assigned error and appealed to this Court. We think the court below should not have allowed the motion.

Gibson was a youth, fourteen years old. One Murray was his boss, or superintendent, and the evidence on the part of plaintiff is to the effect that he did not instruct him as to the danger. Gibson testified, in part, as follows: "Mr. Murray told me to do what I was doing at the time I got hurt. I was up on the table straightening out the cloth and the blade cut my finger. The blade that folds the cloth struck my finger. I could see it. I knew it was there. I knew it was in motion. *I did not know any danger in the machine.* The blade is that part of the machine that folds the cloth. The blade travels backward and forward. It follows the cloth. It was as long as across the table (pointing to table). It was in plain view moving backward and forward at the time I put my hands on the cloth to straighten it out."

In *Roth v. Northern Pacific Lumbering Co.,* 22 Pac. Rep., 845 (18 Ore., 205), it was said: "But it is to be borne in mind that there is a difference between a knowledge of the facts and a knowledge of the risks which they involve. One may know the facts, and yet not understand the risk; or, as *Mr. Justice Byles* observed, 'A servant knowing the facts may be utterly ignorant of the risks.' *Clarke v. Holmes,* 7 Hurl. & N., 937. For, after all, *Mr. Justice Hallett* said, 'It is not so much a question whether the party injured has knowledge of all the facts in his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known, if he cannot make the deductions that peril arises from the relation of the facts? The peril may be a fact in itself of which he should be informed.' *McGowan v. Mining Co.,* 3 McCrary, 393, 9 Fed. Rep., 861. So that in a case like the present, where the evidence is conflicting as to whether or not the defendant had knowledge of the risks to which he was exposed, the question is preëminently for the jury." *Boswell v. Hosiery Mills,* 191 N. C., at p. 557.

The law as stated in *Sutton v. Melton,* 183 N. C., at p. 372 (citing numerous authorities), is as follows: "It is the duty of the master who employs a servant in a place of danger to give him such warning and instruction as is reasonably required by his youth, inexperience, and want of capacity, and as will enable him, with the exercise of ordinary care, to perform the duties of his employment with reasonable safety to himself."

For the reasons given, the judgment is

Reversed.

J. J. CRAFFORD v. LAFAYETTE LIFE INSURANCE COMPANY.

(Filed 22 January, 1930.)

Appearance A a—Demurrer to complaint on ground that cause of action was not stated therein is general appearance waiving service of summons.

Where an action is begun in a general County Court of one county and the defendant is served with summons in another county, and appears and demurs to the complaint on the ground that it failed to state a cause of action for an amount within the jurisdiction of the Superior Court, and thereafter makes a special appearance and moves to strike out the service because the action was within the jurisdiction of a justice of the peace. and that therefore the County Court could not issue summons outside the county: *Held*, by appearing and demurring to the complaint the defendant waived his right to object to the service, and the County Court acquired jurisdiction whether the action was within the jurisdiction of the Superior Court or the court of a justice of the peace.

APPEAL by defendant from *Cranmer, J.*, at September Term, 1929, of ALAMANCE. Affirmed.

From judgment affirming orders of the General County Court of Alamance County, overruling its demurrer to the complaint, and denying its motion that the service of the summons be stricken out, defendant appealed to the Supreme Court.

Carroll & Carroll for plaintiff.

Varser, Lawrence, Proctor & McIntyre and Coulter, Cooper & Carr for defendant.

PER CURIAM. This action was begun in the General County Court of Alamance County. Plaintiff is a resident of said county. Defendant is a corporation, organized under the laws of this State, with its principal office at Lumberton, in Robeson County. The summons in the action was served on defendant in Robeson County.

It is immaterial for the purposes of this appeal, whether the General County Court of Alamance County has jurisdiction of this action, because, as plaintiff contends, the action is within the jurisdiction of the Superior Court of said county, or whether said court has jurisdiction of the action, because, as defendant contends, the action is within the jurisdiction of a justice of the peace of said county. In either case, the court had jurisdiction of the action. N. C. Code 1927, sec. 1608(n). If the action is within the jurisdiction of the Superior Court of Alamance County, because the sum demanded in the complaint is $229.20, the General County Court acquired jurisdiction of the defendant by the

service of the summons in Robeson County. If the action is not within the jurisdiction of the Superior Court, but is within the jurisdiction of a justice of the peace of Alamance County, because upon the allegations of the complaint, plaintiff is entitled to demand judgment for only $70, the General County Court of Alamance County acquired jurisdiction of defendant, when it appeared and demurred to the complaint, on the ground that the facts stated therein are not sufficient to constitute a cause of action upon which plaintiff is entitled to recover the sum of $229.20. By its appearance in the action, for the purpose of filing a demurrer to the complaint, defendant waived the defective service of the summons, because made in Robeson County, if the action is not within the jurisdiction of the Superior Court of Alamance County. *Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175. The subsequent special appearance of the defendant for the purpose of its motion that the service be stricken out, was too late. The General County Court of Alamance County had theretofore acquired jurisdiction of defendant when it appeared and filed its demurrer to the complaint.

On this record, the General County Court of Alamance County has jurisdiction of the defendant, whether the plaintiff upon the allegations of his complaint has stated a cause of action for $229.20, as contended by him, or whether he has stated a cause of action for only $70, as contended by defendant. The merits of these contentions are not presented by this appeal. We decide only that there is no error in the judgment of the Superior Court, affirming the orders of the General County Court of Alamance County. The judgment is

Affirmed.

ALFRED H. COLVARD, GRAHAM COUNTY ET AL. V. C. M. DICUS AND J. P. DICUS, TRADING AS DICUS BROTHERS.

(Filed 22 January, 1930.)

Appeal and Error J c—Judgment supported by findings of fact supported by evidence is conclusive.

Upon jury trial being waived under an agreement that the judge should find the facts, his judgment thereon is conclusive on appeal when the evidence supports the facts upon which the judgment was entered.

CIVIL ACTION, before *McElroy, J.,* at Fall Term, 1929, of GRAHAM.

Morphew & Morphew and R. L. Phillips for plaintiff.
T. N. Jenkins and Alley & Alley for defendant.

PER CURIAM. A jury trial was waived and the trial judge found the facts and entered judgment thereon. There was evidence to support the findings of fact, and the facts found support the judgment. In such event the findings of fact and the judgment thereon are conclusive. *Eley v. R. R.*, 165 N. C., 78, 80 S. E., 1064; *Holmes Electric Co. v. Carolina Power and Light Co.*, 197 N. C., 766.

Affirmed.

A. C. BIGGS v. CITY OF ASHEVILLE.

(Filed 22 January, 1930.)

Municipal Corporations J a—Where complaint shows that claim of damages was not given within time prescribed by charter nonsuit is proper.

Where it appears upon the face of the complaint in an action against a city for damages that notice and claim of damages had not been given in the time required by the city charter as a prerequisite to the right of action, a judgment as of nonsuit is properly entered.

APPEAL by plaintiff from *Schenck, J.*, at June Term, 1929, of BUNCOMBE.

Civil action to recover damages for an alleged negligent injury resulting from certain street improvements.

The charter of the city of Asheville provides that no action for damages either to person or property shall be instituted against the said city unless within ninety days of the happening or infliction of the injury the plaintiff gives due notice to the board of commissioners of such injuries setting forth in such notice the date and place of happening of such injury, the manner and character of the same, and the amount of damages claimed therefor.

The plaintiff filed with the governing board of the city of Asheville on 2 February, 1928, a claim for damages for injuries alleged to have been sustained by him and his business and profession and for the loss of property by reason of the improvements placed on Woodfin Street by the defendant and set forth in said notice that the damages commenced to occur on the ..... day of August, 1925, and continued throughout the years 1925, 1926, and 1927.

From a judgment of nonsuit the plaintiff appeals, assigning errors.

Joseph W. Little and Kitchin & Kitchin for plaintiff.
George Pennell for defendant.

PER CURIAM. It appears on the face of the notice filed by the plaintiff that the same was not given within the time, ninety days, required by the city charter, as interpreted in *Dayton v. Asheville,* 185 N. C., 12, 115 S. E., 827. It would seem, therefore, that the judgment of nonsuit was correctly entered.

Affirmed.